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Supreme Court of the United States

October Term, 1975
No. 75-1537

ERIC BLITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

ERIC BLITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Eric Blitz, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

Second Circuit, affirming a judgment entered on December 31, 1974 in the United States District Court for the Southern District of New York, convicting him of a violation of the Investment Company Act of 1940, 15 U.S.C. Section 80(a)-17(e)(1), and sentencing him to a year in prison and a $5,000.00 fine.

OPINION BELOW

The Court of Appeals, Timbers, C.J., with Mansfield, C.J., concurring, affirmed the judgment of the District Court in an opinion, a copy of which is annexed hereto as Appendix A.

No opinion was rendered by the District Court.

JURISDICTION

The judgment below was entered on March 25, 1976. The jurisdiction of this Court is invoked under Title 28, United

States Code, Section 1254.

QUESTIONS PRESENTED

1. Whether the government violated petitioner's right to due process under the Fifth Amendment when it failed to inform the indicting grand jury, before which petitioner had previously appeared and asserted his privilege against self incrimination, (a) that petitioner, at his own request, had later testified but, unbeknown to him, before a different grand jury, about his lack of involvement in the instant case; and (b) that petitioner had recently been acquitted in a related case at which government's chief witness in both cases testified that the defendant was unaware of either of the alleged stock manipulations.

2. Whether petitioner is entitled to a new trial as a matter of law where

he was joined in an indictment with fourteen others based upon an alleged single conspiracy where there was no reasonable basis for the government's pre-trial assertion that it would prove the conspiracy charged against petitioner, where the conspiracy count was dismissed by the trial court, and where actual prejudice accrued as a result of the joint trial.

3. Whether the court's charge to the jury which included **bona fide loans** within the meaning of the term "compensation" as used in the Investment Company Act of 1940, 15 U.S.C. Section 80(a)-17(e)(1), improperly construed the statute, thus requiring reversal of petitioner's conviction for violation of that statute.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. United States Constitution, Fifth

Amendment:

> "No person shall...be deprived of life, liberty, or property, without due process of law...."

2. Title 15 United States Code Section 80(a)-17(e)(1):

> "It shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such person- (1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker."

STATEMENT OF THE CASE

Procedural Background

Indictment 74 Cr. 1226, containing twenty-five counts, was filed in the United States District Court for the Southern District of New York on December 31, 1974 against petitioner,

Eric T. Blitz, and fourteen co-defendants.* In essence, the indictment charged the fifteen defendants with a single conspiracy and substantive crimes of defrauding purchasers of shares of Elinvest, Inc. ("Elinvest") in violation of 18 U.S.C. Section 371 (Count 1); 15 U.S.C. Section 77q(a)(x) (Counts 2-6); 15 U.S.C. Sections78j(b)(ff) (Counts 7-13); 18 U.S.C. Section 1341 (Counts 14-18); and 15 U.S.C. Section 80a-17(e)(1) (Count 19). Count 20 charged three of the defendants with extortion in violation of 18 U.S.C. 1952, and Counts 21-25 charged two defendants with perjury before the grand jury in violation of 18 U.S.C. 1623. Counts 20-25 were severed prior to trial.

*This indictment superseded indictment 74 Cr. 798, in 24 counts, which was filed in August 1974 and named 13 defendants.

Trial on this indictment began before the Hon. Dudley B. Bonsal, United States District Judge, and a jury on January 27, 1975 against petitioner and co-defendants Drew, Horvat, Orpheus and Rosan and lasted five and a half weeks.* Prior to submitting the case to the jury, the court dismissed the conspiracy count against petitioner. On March 4, 1975 the jury rendered verdicts of guilty on the conspiracy, securities and mail violations against defendants Horvat and Orpheus and on the conspiracy and securities violations against defendant Drew. Petitioner was acquitted of all the securities and mail

*Two co-defendants, Kadison and Santiago who were named only in the superseding indictment were granted a severance prior to trial. Five other co-defendants: Gerstenzang, McLeod, Rosenthal, Barry Ross and Van Aken pleaded guilty and testified for the government. The other three co-defendants, Baron, Hill, and Santiago, pleaded guilty prior to trial.

fraud charges, but was convicted of Count 19 which charged a violation of the Investment Company Act of 1940. Defendant Rosan was acquitted on all counts.

On April 21, 1975 petitioner moved for a new trial on the grounds of improper joinder and various infirmities in the prosecution. On May 29, 1975 that motion was denied without opinion and petitioner was sentenced to a year in jail and a $5,000.00 fine. On March 25, 1976 the United States Court of Appeals for the Second Circuit affirmed the petitioner's conviction.

The Government's Case

The government's direct case included over 2,200 pages of testimony from some 30 witnesses along with dozens of exhibits which were introduced in evidence. It was directed at

establishing, in intricate detail, the creation, development and implementation of an elaborate conspiracy involving more than twenty people to manipulate the price of Elinvest stock--a conspiracy clearly designed to defraud purchasers of the stock by artificially inflating its price.

A. The Conspiracy

The government's main witness was George Van Aken, the central figure in the conspiracy, who testified for nearly a week (R. 399-983).* A "boy wonder" in the stock market, Van Aken had made hundreds of thousands of dollars in the 1960's through various stock transactions, some legitimate and some

*References preceded by "A" refer to the Appendix below; "R" to the transcript of the trial; and "GX" and "DX" to government and defense exhibits.

illegal. He admitted to participation in seven stock manipulations--including "Elinvest"--during the late 1960's and early 1970's (R. 596-97).

Van Aken testified that in October 1970 he invested $50,000.00 in a company known as Leisure Time Marine Corporation, the principal asset of which was a large marina on Long Island Sound. In about December 1970, he also induced his father-in-law, John Bradley, to invest approximately $50,000.00 in the marina. And, in February 1971, Van Aken agreed to obtain an additional amount of Leisure Time stock.

The conspiracy really began in March 1971 when co-conspirator Raymond D'Onofrio told Van Aken that he had a corporate "shell" named Elinvest which he controlled with a co-conspirator Glenn Woo. D'Onofrio said that since

there were very few shares of Elinvest which were publicly held, it would be easy to manipulate the price of the stock and realize a substantial profit. Within a few days, Van Aken met with Woo and discussed the possibility of merging Leisure Time and Elinvest and then manipulating the price of the stock.

Van Aken then called co-defendant Steven Hill, counsel for Leisure Time, and told him that he wanted to merge Leisure Time into Elinvest. After numerous discussions about alternative methods, the conspirators started to leak the news of a possible merger of Leisure Time with Elinvest. Van Aken told various other co-conspirators that they could double their money by investing before the merger, and arranged the sale of stock to them

(R. 443-45). Van Aken also arranged the sale of 55,000 shares to Professor Steven Duke of Yale Law School, who bought them with money borrowed from Van Aken (R. 439-42).

On April 26, 1971, a stockholders' meeting of Leisure Time was held at which the merger with Elinvest was approved (R. 428-30). The next day defendant Robert J. Rosan, president of the concern that handled the above transactions, and Van Aken met. Van Aken told Rosan that he expected the price of Elinvest stock to rise sharply, and Rosan agreed to handle future transactions in the stock for commissions, which he subsequently did. In May, 1971 Van Aken arranged for the sale of 50,000 Elinvest shares for Professor Duke who paid a 25% fee upon Van Aken's advice (R. 489-91).

During that same month, Van Aken had a series of telephone conversations and meetings with defendant Robin Baron, president of Baron & Co., a registered broker-dealer in New Jersey, who told Van Aken that he was also going to handle a block of stock for Duke. Baron told Van Aken that he hoped Van Aken was going to stay in the Elinvest situation for "the long haul" because Baron had some show business customers whom he didn't "want to hurt". Van Aken said he told Baron that he was involved in a big way and had a substantial amount of money invested and that he would try to help Baron out with institutional buying (R. 492-93).

By late June, however, Van Aken was apparently dissatisfied with the progress of the manipulation and arranged a meeting with defendant

Orpheus, a broker who had expressed interest in the Elinvest situation, defendant Santini, and Professor Duke at Van Aken's apartment for the purpose of selling some of the Duke stock and of pushing the price up. At the meeting, after some discussion which also involved defendant William McLeod who was telephoned by Orpheus, Duke gave Orpheus 10,000 shares of Elinvest stock to sell.

Also at the meeting, Santini asked Van Aken for the use of Van Aken's apartment for a few days to try to sell the stock. Van Aken agreed and the next day Santini returned to the apartment with defendants Orpheus, Gerstenzang, and a man named Julie Gladstein. Van Aken discussed with this group the effort to move the stock from $4.00 to $8.00 and to get some institutions

involved in purchasing it. Orpheus, Gladstein, and Gerstenzang then began making telephone calls from a list of customers and the scheme thereafter turned into a rank boiler-room operation. On July 2, 1971, the group was joined by defendant William Drew (R. 496-500).

From July on, Van Aken and his cohorts continued their efforts to manipulate Elinvest stock. There was extensive testimony concerning those efforts, as well as testimony about several run-ins between what came to be warring factions within the conspiracy, with one side--which was "connected with some of these Mafia-type guys" (R. 479)--threatening Van Aken with physical harm and Van Aken's faction responding in kind (R. 1239-48). There was also testimony that Erwin Gerstensang and Norman Pollisky, government witnesses who had

testified as to efforts made to convince them to buy Elinvest, each had been threatened with physical harm if he didn't buy Elinvest stock (R. 1874, 1915).

Ten other witnesses testified as to their purchases of Elinvest stock on the recommendation of one or more of the defendants. There was, however, no testimony to link petitioner with any of these efforts to manipulate the stock.

B. The Case against Petitioner

Petitioner, a portfolio manager for the Astron Mutual Fund in Tacoma, Washington was one of the people Van Aken contacted in his effort to manipulate the Elinvest stock. Van Aken testified that in late May or early June, 1971 he telephoned Blitz and told him that he wanted to sell a large

block of Elinvest stock and that if Blitz bought the stock for the Astron Fund Van Aken "could make as much as $25,000.00 available." (R. 454).

Shortly thereafter, Van Aken said, Blitz called him, told him that his brother was in trouble and asked whether the $25,000.00 was still available. Van Aken told him that it was, whereupon Blitz agreed to buy 25,000 shares of Elinvest for the Astron Fund. He also testified that he subsequently gave Blitz a check signed by Bradley, for the $25,000.00 in New York on June 18 (R. 455-56, 459-62).

In March, 1972, according to Van Aken, Bradley's accountant, Milton Hoffman told Bradley to file a Form 1099 with respect to the payment to Blitz, or to write it off as an uncollectible debt. If the latter course was chosen,

Hoffman suggested that Bradley send Blitz a letter requesting repayment of the loan. This was subsequently done.

Bradley did deduct the $25,000.00 payment to Blitz as an uncollectible loan on his 1971 tax return. In addition, Van Aken tried to contact Blitz on at least three occasions to demand repayment of the loan (R. 555).

In August Blitz sent a check for $26,750.00--representing the $25,000.00 plus interest--to Bradley along with a note thanking Bradley for the loan (DX. B, GX. 21-a; R. 560-64).

Van Aken also testified that to his knowledge Blitz did not know any of the other defendants in the case or anything about the "Elinvest" manipulation (R. 660-63, 605-06).

In addition Bradley testified that he had written both the check to Blitz

and the letter requesting that Blitz repay the loan, and that he had received the repayment check from Blitz along with the personal note. He also stated that he had deducted the $25,000.00 as an uncollectible loan on his 1971 tax return (R. 1005-18).

Two other witnesses testified that Blitz had told them in 1973 of the loan and his repayment of it.

Blitz' Defense

Petitioner testified on his own behalf. He stated that Van Aken had called him several times to tell him that Elinvest was doing well and that the Astron Fund should invest in it. Blitz checked it out by talking with associates and by looking at the "pink sheets". On the basis of those checks and on Van Aken's reputation for success, he agreed to discuss the matter further

with Van Aken when he visited New York in early June. On June 8 he met Van Aken who told him about the possibilities of the Marina and showed him a financial statement of Leisure Time/ Elinvest. The following day, Blitz testified, he bought the shares for the Astron Fund (R. 2295-97).

Upon his return to Washington, Blitz learned that his brother was in trouble and he needed some money to take care of his family. The following day, June 14, Van Aken telephoned Blitz to check on the purchase of Elinvest stock. During the conversation Blitz mentioned his brother's problems and Van Aken offered to lend him $25,000.00 to help him out. Blitz refused the offer, believing that accepting it could give the appearance of a conflict of interest. Van Aken then suggested that his father-

in-law, John Bradley, would be willing to lend Blitz the money. Blitz agreed to accept the loan on that basis. A few days later, Blitz testified, he received the check in the mail (R. 2314-25).

Blitz gave $5,000.00 to his brother and invested the rest, hoping to make enough on the investment to repay Bradley with interest. However, because of the depressed market Blitz lost a large portion of his investment and was unable to repay the loan within six months as he had intended (R. 2325-26).

By August, Blitz said, he had made some money in the market and was able to repay the $25,000.00 loan with interest as agreed (R. 2341).

Blitz categorically denied ever accepting any money from Van Aken in connection with his purchase of any

stock for the Astron Fund. Blitz also testified that he knew none of the defendants in the case other than Van Aken and Rosenthal and was not aware of the manipulation of the Elinvest stock (R. 2288-94, 2314, 2328-30, 2398).

Motions for Severance

Prior to trial, defense counsel initially requested that the government voluntarily sever Blitz' case on the ground that he could not have been a member of the alleged conspiracy to manipulate the Elinvest stock. Although the government had consented to a severance in a prior similar case in which Blitz was acquitted after a three day trial,* it refused to do so here. Thus, on December 19, 1974, Blitz moved for a severance contending that the only

*United States v. Deutsch, et al., 73 Cr. 1083 (the "Acrite" case).

"real" charge against him was Count 19, that he knew none of the alleged conspirators except Van Aken and Rosenthal, and that the $25,000.00 check he received from Bradley was a bona fide loan (A. 41-46).

After the government obtained the superseding indictment herein, Blitz filed a supplemental affidavit in support of his pending motion for severance (A. 47-49). He reminded the court that Van Aken had previously testified that Blitz had no knowledge of any manipulation in which Van Aken participated (A. 48). Although the government did not file a written response to the severance motion, at a pre-trial conference on January 9, 1975, the court denied the motion based upon the government's representation that Blitz was a member of the conspiracy (A. 53-54).

This motion was continually renewed--without success-- during the trial, specifically after the government's opening statement (R. 38), during Van Aken's testimony (R. 571), at the conclusion of the government's case (A.55-67; R. 2219), and prior to the submission of the case to the jury (A. 68-69; R. 3296, 3334-35). It was also renewed in a Motion for a New Trial, filed on April 10, 1975, which was denied without opinion on May 29, 1975 at Blitz' sentencing (A. 143-146).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this Court should exercise its judicial discretion to issue the Writ of Certiorari, as provided by Rule 19, first, because the government's conduct in presenting the case against petitioner to the grand jury violated his right to due process under the Fifth Amendment; second, because the government's increasingly frequent practice of joining defendants in multi-defendant indictments based upon unfounded conspiracy charges should be discouraged, and because that practice here resulted in a denial of petitioner's right to a fair trial; and third, because the interpretation of statutory language by the trial court, affirmed by the Court of Appeals for the Second Circuit, was clearly erroneous and conflicts with

the doctrine that criminal statutes must be strictly construed.

I. THE GOVERNMENT'S FAILURE TO FAIRLY AND PROPERLY PRESENT THE CASE AGAINST PETITIONER TO THE GRAND JURY VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

On March 26, 1973 petitioner was subpoenaed to appear before the "Elinvest" grand jury in the Southern District of New York. He appeared at that time but asserted his Fifth Amendment privilege and refused to testify. In July 1973, however, petitioner asked for permission to appear again to testify before the grand jury. The government agreed, but without informing Blitz, brought him before a different grand jury--the "Acrite" grand jury--and elicited his testimony regarding his involvement in both the "Acrite" case and in this, the "Elinvest", case. This "Acrite" grand jury indicted

petitioner and several others on November 29, 1973 for various violations of the federal securities laws, including conspiracy, arising out of the manipulation of "Acrite" stock. On June 14, 1974 petitioner was acquitted of these charges, and at the trial the major government witness (George Van Aken) testified that petitioner had no knowledge of the alleged manipulation of "Acrite" or, indeed, of any other manipulation of which Van Aken had knowledge.

Two months later the government sought and obtained from the "Elinvest" grand jury--before which petitioner had previously invoked the Fifth Amendment and refused to testify--an indictment against petitioner and others for various violations of the federal securities laws, including conspiracy,

arising out of the "Elinvest" manipulation. In seeking this second indictment against petitioner, the government never informed the grand jury: (1) that petitioner had previously sought and received permission to testify before what he thought to be that grand jury (but which turned out to be a different grand jury); (2) that petitioner had previously testified fully about the "Elinvest" case for which he was being indicted; (3) that petitioner had already been acquitted in a similar, related case, "Acrite", which was premised upon the testimony of the same principal government witness; and (4) that that government witness (George Van Aken) had previously testified under oath that petitioner was unaware of the alleged "Elinvest" manipulation. Unaware of all of the above, this grand jury indicted

petitioner along with numerous other defendants on August 13, 1974.*

Thus, the grand jury returning the indictment in the instant case was left with the impression that petitioner had asserted his Fifth Amendment privilege (with all of its attendant implications) and refused to testify, which was, in fact, not true. Moreover, the prosecutor never informed the grand jury of the various items of clearly exculpatory evidence including the testimony of its own chief witness in both cases that to his knowledge petitioner was unaware of the alleged "Elinvest" manipulation.

While the Court of Appeals dismissed all this as "frivolous", it is respectfully submitted that the above

*This indictment was later superseded by the instant indictment filed on December 31, 1974 by the second "Elinvest" grand jury which had also not heard the defendant's testimony or any other favorable evidence as outlined above.

procedure was a clear violation of petitioner's right to due process requiring reversal of this conviction.* The failure to advise the grand jury that the defendant was no longer relying on his constitutional right not to testify, and that he had appeared before a grand jury selected by the prosecutor and testified fully about the very matter under inquiry, was a clear abuse by the government of the grand jury and its function. See American Bar Association Standards Relating to the Prosecution Function, Section 3.6 (Approved Draft, 1971), which states: "The prosecutor should disclose to the grand

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* Although the Court of Appeals alluded to a possible waiver of this objection to the grand jury procedure (along with others not here urged), no such waiver was possible since the government did not reveal the true facts regarding this matter until shortly before the oral argument of the appeal.

jury any evidence which he knows will tend to negate guilt."

The facts of this petitioner's voluntary testimony and of his acquittal in a related case where the chief government witness testified that the petitioner was unaware of the alleged "Elinvest" stock manipulation clearly tended to negate guilt. Surely the grand jury could not have been expected to seek such evidence, which it did not know existed. It had to, and did, rely upon what it thought was a fair and even-handed presentation of evidence by the prosecutor.

Under the Fifth Amendment, the grand jury is designed to act independently of either prosecuting attorney or judge, and its mission is as much to exonerate the innocent as it is to bring to trial those who may be guilty.

United States v. Dionisio, 40 U.S. 1, 16-17 (1973). In the instant case, however, the grand jury could not serve that function since it acted entirely on the basis of the one-sided case which the prosecuting attorney chose to present to it.

The Supreme Court of California recently faced a very similar issue in Johnson v. Superior Court of San Joaquin County, 125 Cal. Rptr. 32, 539 P. 2d 792 (1975). There, the prosecutor failed to tell the grand jury that the defendant had testified at a preliminary hearing at which the charge against him had been dismissed by a magistrate and, as here, left the grand jury with the impression that the defendant would, if called, refuse to testify. Noting that the grand jury's "historic role as a protective bulwark standing solidly between the ordinary

citizen and an overzealous prosecutor" is well established in both the California and the federal systems, the court found the above procedure to be a clear violation of the defendant's rights (539 P.2d at 796). While the court based its decision on a California statute and accordingly found it unnecessary to consider the defendant's "alternative due process argument", its reasoning is directly in point to the instant case. It is respectfully submitted that this Court should therefore consider the question of whether that same holding is equally required by the due process clause of the Fifth Amendment. cf. United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

If the government is permitted to use such tactics without censure or sanction, the grand jury's role as a

shield against unfounded charges will be greatly diminished, a result that this Court should not countenance.

II. THE JOINDER OF PETITIONER IN THIS INDICTMENT VIOLATED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

The instant indictment charged petitioner and fourteen co-defendants with participation in a single conspiracy to manipulate Elinvest stock, as well as substantive offenses in connection therewith. As is so frequently the case, the conspiracy count was the sole basis for joinder of petitioner in this multi-defendant indictment.

Prior to trial, petitioner moved for a severance on the ground that he had no part in, or knowledge of, the conspiracy alleged in the indictment, and no connection whatever with any of the other defendants named therein ex-

cept Van Aken and Rosenthal, both of whom were to be government witnesses (A. 44,48). This severance motion was supported by testimony at a previous trial before the same court in June 1974, in which petitioner had been acquitted of a charge of accepting a pay-off from George Van Aken in connection with the purchase of another stock, "Acrite", for the Astron Fund--a charge strikingly similar to that involved here. Prior to that trial, petitioner had also sought, and--upon the government's consent--obtained, a separate trial (which took three days) from six co-defendants with whom he had originally been indicted.

The government's principal witness at the "Acrite" trial, George Van Aken, had testified unequivocally that Blitz had no knowledge of the manipulation of Acrite stock or--significantly--of any

other manipulation of which Van Aken had knowledge (A. 49).

Since Van Aken was also to be the government's main witness in this case--indeed the only witness with first hand knowledge of the Blitz transaction--it was somewhat surprising that the government here, unlike "Acrite", strenuously opposed the severance motion. At oral argument on the motion, the Assistant United States Attorney assured the court that the government would prove by "ample evidence" that Blitz <u>was</u> a member of the conspiracy and, based upon this representation, the severance motion was denied (A. 54).

Petitioner was thus required to go to trial with four defendants whom he did not know, and to endure the ordeal and expense of a five-week trial rather than one which would have lasted only a

few days had he been tried alone. Moreover, aside from this inherent prejudice, the joint trial was extremely prejudicial legally, and may well have been the cause of his conviction of Count 19 rather than an outright acquittal.

The government's pre-trial representation to the court, was, in fact, wholly unjustified, as demonstrated by the court's dismissal of the conspiracy charge against petitioner prior to submission of the case to the jury. Since Van Aken again testified--as he had before--that petitioner had no knowledge of the "Elinvest" manipulation, and since the government offered no other evidence of petitioner's membership in the conspiracy, the dismissal of the conspiracy count was clearly warranted, if not inevitable.

However, even after dismissing the

conspiracy count, the court refused petitioner's renewed motion for a severance which was based upon the then clear misjoinder under Rule 8(b), and upon the prejudice which had accrued from the mass of evidence, irrelevant to petitioner, which had come in with no cautionary instructions on the conspiracy charge.

It is respectfully submitted that since petitioner's joinder in the indictment was--from the outset--improper, denial of his severance motions before, during, and after trial was erroneous and requires reversal of his conviction on Count 19.

A. The joinder was improper as a matter of law.

Rule 8(b), F.R. Crim. P., provides that defendants may be joined together in a single indictment only if they are

"alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Under this rule, it is generally permissible to join defendants in a single indictment if they are alleged to have acted in concert, and a charge of a single conspiracy is normally sufficient to permit such joiner. However, it has long been recognized that allegations of a single conspiracy in an indictment must be made in good faith and with a "reasonable expectation that sufficient proof (of the allegations justifying the joinder) would be forthcoming at trial." United States v. Aiken, 373 F.2d 294, 299 (2d Cir.), cert. denied, 389 U.S. 833 (1967); Stern v. United States, 409 F.2d 819, 820 (2d Cir. 1969). Where there is--

or could be--no such reasonable expectation, the initial joinder is improper, and a new trial is required.

While the courts are, perhaps understandably, reluctant to find that initial allegations in the indictment were not made in good faith, it is difficult to discern any reasonable basis for the government's claimed expectation that it could prove the conspiracy as to petitioner in view of Van Aken's prior testimony and the total absence of any other proof on this point. Notwithstanding any subjective "hope" which may have been fostered by the prosecution, there was simply no objective basis for the expectation that the conspiracy count would be sustained. Under these circumstances, the fact of the improper joiner itself requires a new trial.

See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971); Metheany v. United States, 365 F.2d 90, 95 (9th Cir. 1966). In Donaway, the court noted that the decisions holding that a conspiracy count can be a sufficient link to justify the joinder of defendants,

> "...do not permit the Government to avoid the requirement of Rule 8(b) merely by adding a conspiracy count in order to link all defendants. Linking can be allowed, to uphold joinder, only where the conspiracy charge was put forth in good faith." (Emphasis added.)

See also, United States v. Manfredi, 275 F.2d 588, 593 (2d Cir.), cert. denied, 363 U.S. 828 (1960); United States v. Agueci, 310 F.2d 817, 840-41 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

In United States v. Branker, 395

F. 2d 881 (2d Cir. 1968), the court pointed out the government's responsibility--both to defendants and to the court--to fairly assess its chances of proving a conspiracy which provides the justification for joinder. It is respectfully submitted that here, as in Branker, the government simply did not fairly assess its chances of proving the conspiracy as to petitioner. Here, as in Branker, the testimony of the government's principal witness provided no surprises, and no other evidence was offered to prove Blitz' membership in the conspiracy. Surely the government must have known that, as in Branker, its "chances of proving the conspiracy charged in the indictment were indeed slim". To have permitted the government to act in this fashion merely to avoid a two-or-three day

trial, or, perhaps more importantly, to improve its chances of conviction, was both improper and unfair. It is respectfully submitted that the government must be required to suffer the consequences of this type of conduct, and that a new, separate trial should therefore be ordered.

B. The joint trial was in fact prejudicial.

Even if this Court were to hold, however, that a new trial would be warranted only on a showing of actual prejudice, it is submitted that such prejudice was manifestly present at the trial. In the first place, the length of the trial alone was prejudicial, since the jury was required to sift out about two or three days of testimony relating to petitioner which was disjointedly scattered throughout five-and-one half

weeks of trial.

An enormous quantum of evidence was quite properly introduced on the conspiracy charge, none of which pertained to petitioner, and--since petitioner was alleged to have been a member of the conspiracy--no cautionary instructions were given to the jury concerning this evidence. In fact, of the twenty-nine witnesses who testified on the government's direct case, only six offered any testimony about petitioner, and only one, Van Aken, testified to the alleged pay-off in violation of the Investment Company Act of 1940. Of those six witnesses, only about 300 pages of testimony related to petitioner, of a total of the more than 2,200 pages which comprised the government's direct case.

In mere quantitative terms, then,

the jury could not have been expected to accurately weigh and assess the evidence against petitioner separately from the mass of evidence it heard which was irrelevant. See, e.g., United States v. Donaway, supra, where in a similar situation the court stated, "We find it impossible to conclude on the facts here that appellant was not severely prejudiced by the evidence relevant only to the co-defendants," and held that the failure to grant a severance was an abuse of the trial court's discretion.

Moreover, the qualitative nature of the irrelevant testimony was highly prejudicial. The jury was presented with a vivid picture of a sophisticated group of corrupt, greedy men carrying on a complex scheme to manipulate and defraud --a scheme replete with conniving,

dirty-dealing, and overtones of mobsterism. The government deliberately elicited highly-charged testimony from Van Aken and others about the details of the conspiracy involving prominent people like Professor Duke of Yale Law School, charges and innuendos of Mafia connections, underhanded schemes, threats of violence, and strong-arm tactics used by various defendants and co-conspirators. Nor was the picture painted in subtle colors; on the contrary, the government went to great lengths to emphasize the sensational and melodramatic aspects of the case, none of which related to petitioner.

This kind of evidence--unlike some stock fraud cases--was not merely irrelevant to the case against petitioner but was so highly inflammatory and so permeated the trial that it must

necessarily have affected and infected the jury's ability to make a fair and impartial determination of petitioner's guilt or innocence.

It is no answer to say, as did the Court of Appeals, that Blitz was acquitted of the other charges and thus not prejudiced, since it is futile to attempt to accurately assess why a jury makes particular determinations. The effect of all this irrelevant and emotional evidence was to deny petitioner a fair determination of the single valid issue which related to him, *viz.* whether Van Aken or petitioner was telling the truth about the purpose of the payment which petitioner admittedly received from John Bradley and which he admittedly repaid with interest. This relatively simple matter of credibility was the sole genuine issue since the

inception of the government's prosecution against petitioner in March 1973. It was so in the "Acrite" case, and it was so here. Evidence of threats, of violence, of gangsterism, and of Organized Crime had nothing to do with this issue, and would clearly not have been admissible at a separate trial. For the government to have obtained a conviction against petitioner by means of a joint trial in which it was permitted to introduce this kind of evidence was both unfair and wholly unnecessary. Here, as in United States v. Butler, 494 F.2d 1246, 1257 (10th Cir. 1974), "the possiblity that the issue of his guilt was confused with the guilt of other defendants involved in unrelated transactions, at different times and in different places is too great." Here, as in Butler, the

defendant's conviction must therefore be reversed and a new trial ordered.

In United States v. Miley, 513 F. 2d 1191, 1209-10 (2d Cir. 1975), the Second Circuit recently again dealt with what it characterized as "the consequences of the Government's ill-advised practice of attempting to obtain in a single trial convictions of numerous defendants who are only loosely connected in a criminal enterprise." The case is particularly apposite to the instant situation in that in Miley there had been a previous mistrial which informed both the government and the court what the evidence would be at the second trial.

Although holding that several of the defendant's severance motions should have been granted, the Court refused to reverse the convictions only because it

found no possible prejudice which accrued from the improper joinder:

> "...since we have been unable to discern any prejudice from the joinder, we are unwilling to reverse because of denial of the motions for severance, as we surely would under the circumstances of this case if any prejudice had been shown." 513 F.2d at 1210 (Emphasis added.)

The situation here is strikingly similar to that in Miley, except that here prejudice has clearly been shown. Thus, it is respectfully submitted that under the circumstances of this case, petitioner should have been given a new, separate trial at which his guilt or innocence could be fairly and impartially determined.

III. THE COURT'S INSTRUCTION TO THE JURY REGARDING CONSTRUCTION OF 15 U.S.C. SECTION 80(a)-17(e)(1) WAS CLEARLY ERRONEOUS AND GAVE THE STATUTE SUCH A BROAD INTERPRETATION AS TO VIOLATE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS.

The only charge of which petitioner was convicted was a violation of the Investment Company Act of 1940, 15 U.S.C. Section 89(a) - 17(e)(1). This statute makes it unlawful for "any affiliated person of a registered investment company...to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker." (Emphasis added.)

Since it was not disputed that petitioner accepted a check for $25,000.00 from John Bradley, the only conflict at trial concerned the purpose of the payment. Van Aken claimed that the money was given as an outright pay-

off, which he did not expect returned. Petitioner, however, said that he accepted it only as a loan, which he intended to repay.* It was not disputed that he did repay it in August 1972 with interest.

Based on Van Aken's testimony, the government basically contended--and charged in the indictment--that the money was a pay-off and nothing else. However, perhaps recognizing that the evidence on this issue was, at best, inconclusive, the prosecutor contended during trial that petitioner's acceptance of the payment violated the statute even if it was a loan (A. 79).

The court accepted this position

*As noted, the $25,000.00 payment was by check which was deposited by Blitz in his bank account, thereby allowing it to be readily traced (GX 15; A.70). It would appear, therefore, that neither of the parties viewed this payment as illegal at the time it was made.

in its charge and told the jury that, "...here the government contends and the defendant Blitz denies that when Blitz took the money he knew that Van Aken was trying to sell the stock to the Astron Fund, and if you find that he did and you find that there was a connection between the payment and the sale of Elinvest stock, you may find the defendant Blitz guilty under this count, regardless of whether the payment is labelled as a gift or a payoff or as a loan...." (Emphasis added.) (A. 88).

It is respectfully submitted that by its terms Section 80(a)-17(e) (1) does not prohibit loans, and that the court's charge to the jury was therefore clearly erroneous insofar as it permitted conviction even if the jury believed petitioner's testimony that the money was a bona fide loan.

Although research has disclosed no case dealing with the question of whether a loan is compensation under the Investment Company Act, there are numerous decisions dealing with this issue in the context of the federal income tax laws. The Supreme Court of the United States, in an early case, held that the provision of the Revenue Act of 1938 (Section 22(a)) defining gross income as including "gains, profits and income derived from salaries, wages, or compensation for personal service...of whatever kind and in whatever form paid" was broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation whatever the form or mode by which it was effected. C.I.R. v. Smith, 324 U.S. 177, 180-81, rehearing denied, 324 U.S. 695 (1945).

(Emphasis added.) In Silverman v. C.I.R., 253 F.2d 849, 851 (8th Cir. 1958), the court stated that any economic benefit conferred as compensation was included in gross income for tax purposes, a principle reiterated in C.I.R. v. Mendel, 351 F.2d 580 (4th Cir. 1965), as well as in many other cases. See, e.g., Ward v. C.I.R., 159 F.2d 502 (2d Cir. 1947); Gotcher v. United States, 259 F. Supp. 340 (D.C. Tex. 1966); Painter v. Campbell, 110 F. Supp. 503 (D.C. Tex. 1953).

This definition of the term "income" is, perhaps, as broad as is constitutionally permissible. Yet, despite its breadth, it has been consistently held that bona fide loans are not income within this definition. The controlling factor in determining what is and is not income is whether the recipient obtains

an economic benefit. Thus, in James v. United States, 366 U.S. 213, 219 (1961), the Supreme Court held that loans are not income because they carry with them a "consensual recognition...of an obligation to repay." See also, Rogan v. Merten, 153 F.2d 937 (9th Cir. 1946); Consolidated-Hammer Dry Plate & Film Co. v. C.I.R., 317 F.2d 829 (7th Cir. 1963); United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968).

In United States v. Rosenthal, 470 F.2d 837, 840 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973), the court recognized that "Loans do not ordinarily constitute income," but affirmed the conviction for tax evasion only because the jury could have found that Rosenthal knew he would not be able to, and did not intend to, repay the loans when he

received them. (470 F. 2d at 841). In another recent case, the Eighth Circuit went further, holding that receipts from money borrowed did not become "income" taxable to the corporation, notwithstanding that the corporation could not possibly have repaid all the money received by it in the form of loans as a result of the fraudulent scheme. In Re Diversified Brokers, Inc., 487 F.2d 355, 356-58 (8th Cir. 1973).

The doctrine that criminal statutes must be strictly construed was established as early as 1820 in United States. v. Wiltberger, 5 Wheat. 76, 96 (where Chief Justice Marshall stated that courts are not normally justified in "departing from the plain meaning of words, especially in a penal act,") and has been consistently followed. See, e.g., Bouie v. Columbia, 378 U.S. 347,

362-63 (1964). Thus, "compensation" as used in the instant criminal statute cannot be interpreted more broadly than in other statutes, certainly not tax statutes. Indeed, if the broader interpretation given to the term by the trial court and affirmed by the Court of Appeals is accepted, the statute can no longer be said to have given fair warning of the precise acts it outlaws, and would thus violate the due process requirements of the Fifth and Fourteenth Amendments to the Constitution. This is not to suggest that loans could not have been specifically forbidden by this statute, but the fact is that they were not.* Therefore, the court's charge

*See, e.g., 29 U.S.C. Section 186 (1947, as amended in 1959) which prohibits an employer from paying, lending or delivering any money or other thing of value to a representative of his employees. In support of its request

to the jury that this statute--despite its language--includes bona fide loans was erroneous and requires reversal of

to charge, re Count 19 (A. 79), the government cited United States v. Roth, 333 F.2d 450 (2d Cir. 1964), cert. denied, 380 U.S. 942 (1965), a case decided under this statute before it was amended to include loans within its prohibitions. Roth, however, is unlike the instant case in that in Roth the defendant received large loans on three occasions without interest. Perhaps more importantly, the court in Roth had charged the jury that it must find more than a loan in order to find guilt, that it must find that a substantial monetary benefit or thing of value was conferred to constitute a violation of the statute, 333 F. 2d at 453.

In its decision affirming the conviction in Roth, the court cited United States v. Carter, 311 F. 2d 934 (6th Cir. 1963), where the court held that payment or receipt of bona fide loans was not a crime within the statute and, that the 1959 Amendment was "Congressional recognition that loans had not theretofore been covered." 311 F. 2d at 940. The court in Roth added that whether the loan was bona fide was a question for the jury to decide. In the instant case, the court erroneously failed to instruct the jury to make that decision.

petitioner's conviction.

United States v. Deutsch, 451 F. 2d 98 (2d Cir. 1971), cert. denied, 404 U.S. 1019 (1972) -- cited by the gov't in its brief below and by the Court of Appeals in its decision--held that an opportunity to purchase stock at a discount price--a situation quite different from that involved here--did constitute compensation under this statute. That decision is completely in accord with income tax cases dealing with the same factual situation: both properly hold that such a purchase does constitute compensation. See, e.g., United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931). Deutsch, however, did not hold that loans are compensation within the meaning of this statute, and nothing in Deutsch requires or even implies such a holding.

The key factor which distinguishes a loan from other forms of payment--including that in Deutsch--is the intent of the parties that the money be repaid. Here there was conflicting testimony as to the parties' intent: the jury may have believed petitioner and found that the $25,000.00--paid by check--was a bona fide loan, or it may have believed Van Aken and found that it was a pay-off. But, under the charge which the court gave the jury, that decision was erroneously precluded because of the court's holding that even a bona fide loan was encompassed by the statute. It is therefore respectfully submitted that the judgment against petitioner must be reversed and a new trial ordered so that the jury may determine this issue in accordance with proper instructions.

CONCLUSION

FOR ALL THE ABOVE REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York

April 25, 1976

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 259, 262, 281, 421—September Term, 1975.

(Argued September 23, 1975 Decided March 25, 1976.)

Docket Nos. 75-1237, 75-1240, 75-1241, 75-1334

UNITED STATES OF AMERICA,

Appellee,

v.

ERIC BLITZ, PETER HORVAT, RICHARD ORPHEUS and WILLIAM DREW,

Appellants.

Before:

LUMBARD, MANSFIELD and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction after a jury trial in the Southern District of New York, Dudley B. Bonsal, *District Judge,* finding appellants Horvat, Orpheus and Drew guilty of conspiring to violate the antifraud provisions of the federal securities laws and the mail fraud statute, and on substantive counts of securities fraud and aiding and abetting such fraud; finding Horvat and Orpheus guilty on substantive counts of mail fraud and aiding and abetting such fraud; and finding Blitz, an affiliated person of a registered investment company and acting as an agent, guilty of accepting outside compensation for the

purchase of property in violation of the Investment Companies Act.

Affirmed in part; reversed in part.

ELLIOT L. EVANS, New York, N.Y. (Paul K. Rooney, and Rooney & Evans, New York, N.Y., on the brief), *for Appellant Blitz.*

JEROME T. DORFMAN, New York, N.Y. (Bernard J. Coven, New York, N.Y., on the brief), *for Appellant Horvat.*

WILLIAM L. RICHMAN, New York, N.Y., *for Appellant Orpheus.*

H. ELLIOT WALES, New York, N.Y., *for Appellant Drew.*

DOMINIC F. AMOROSA, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., Michael B. Mukasey, Mark Marmaro, John D. Gordan, III, Asst. U.S. Attys., New York, N.Y., and Edward Levitt, Special Atty., Dept. of Justice, Washington, D.C., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Appellants Eric Blitz, Peter Horvat, Richard Orpheus and William Drew[1] appeal from judgments of conviction

1 The indictment named eleven defendants in addition to the four appellants. Prior to trial, defendants George C. Van Aken, Stephen R. Hill, John J. Santiago, Erwin Gerstenzang, Peter B. Rosenthal, William McLeod and Barry M. Ross pleaded guilty to the conspiracy count (Count 1), and Robin G. Baron pleaded guilty to securities fraud (Count 2). The cases against defendants Robert Turco and Frank Kadison were severed prior to trial. Defendant Robert J. Rosan, who was tried with appellants, was acquitted on all counts.

The perjury count (Count 21) against appellant Horvat was severed prior to trial.

entered upon jury verdicts returned in the Southern District of New York on March 3, 1975 after a five week trial before Dudley B. Bonsal, *District Judge,* finding Horvat, Orpheus and Drew guilty of conspiring to violate the antifraud provisions of the federal securities laws and the mail fraud statute in violation of 18 U.S.C. §371 (1970) (Count 1);[2] finding Horvat, Orpheus and Drew guilty on substantive counts of fraud in connection with the purchase and sale of securities in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78(ff) (1970), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5 (1975), and of aiding and abetting such fraud in violation of 18 U.S.C. §2 (1970) (Counts 7-13); finding Horvat and Orpheus guilty on substantive counts of mail fraud in violation of 18 U.S.C. §1341 (1970) and of aiding and abetting such fraud in violation of 18 U.S.C. §2 (1970) (Counts 14-18);[3] and finding Blitz, an affiliated person of a registered investment company and acting as an agent, guilty of accepting outside compensation for the purchase of property in violation of Sections 17(e) and 99 of the Investment Companies Act of 1940, 15 U.S.C. §§80a-17(e)(1) and 80a-48 (1970) (Count 19).[4]

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2 As submitted to the jury, the conspiracy count (Count 1) charged a conspiracy to violate Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1970), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5 (1975), as well as a conspiracy to violate the mail fraud statute, 18 U.S.C. §1341 (1970). The same antifraud provisions of the securities laws and the same provision of the mail fraud statute constituted the bases of the substantive counts (Counts 7-13 and 14-18, respectively).

3 The substantive securities fraud counts (Counts 7-13) and the substantive mail fraud counts (Counts 14-18) charged either that the named defendants themselves had committed the crimes specified or that they were responsible for fraudulent sales by others in violation of the aiding and abetting statute. See pages 19-22, *infra.*

4 At the close of all of the evidence, the conspiracy count (Count 1) was dismissed as against Blitz; and the substantive counts (Counts

The essential claims of error raised on appeal are: (1) the evidence was insufficient to support the convictions of Horvat, Orpheus and Drew of either conspiracy or the substantive offenses; (2) Blitz and Horvat were entitled to severances; (3) the indictment was defective with respect to Blitz and Horvat because allegedly incompetent evidence was presented to the grand jury; and (4) the court erred in charging the jury and in its evidentiary rulings.

The twenty-five count indictment charged a conspiracy and substantive offenses to manipulate the price of the common stock of Elinvest, Inc. in order to obtain for defendants large profits on their holdings while defrauding public investors. Count 1 charged a conspiracy to violate the antifraud provisions of the federal securities laws and the mail fraud statute; as overt acts it alleged that the co-conspirators themselves made fraudulent sales of Elinvest stock, paid off brokers to sell the stock to their customers and to stimulate demand for it, and bribed an investment adviser to purchase a large amount of the stock on behalf of an investment company. Counts 2-13 and 14-18 charged substantive violations of the antifraud provisions of the securities laws and of the mail fraud statute, respectively, based on fraudulent sales and mailings by defendants, or aided and abetted by them. Count 19 charged that an affiliated person of a registered investment company accepted a $25,000 bribe to cause the company to purchase 25,000 shares of Elinvest stock. Count 20 charged certain defendants with interstate travel in furtherance of

2-6) which charged violations of Sections 17(b) and 24 of the Securities Act of 1933, 15 U.S.C. §§17q(a) and 77x (1970), were dismissed as against all appellants.

Drew was acquitted on the mail fraud counts (Counts 14-18). Blitz was acquitted on the securities fraud and mail fraud counts (Counts 7-18).

Otherwise, the four appellants were convicted on all counts which were submitted to the jury.

the illegal scheme. Counts 21-25 charged two defendants with perjury before the grand jury.

The government concedes that the evidence was insufficient to convict Orpheus and Drew on six of the seven substantive securities fraud counts (Counts 7-12), and that it was insufficient to convict Orpheus on four of the five mail fraud counts (Counts 14-17). We therefore reverse the convictions of Orpheus and Drew on those counts.

For the reasons below, we affirm the convictions of all appellants on all other counts upon which they were convicted.[5]

I. Facts

In view of the issues raised on appeal, including challenges to the sufficiency of the evidence, the following summary of events from March of 1971 until August of 1972 is believed necessary to an understanding of our rulings on those issues.

(A) *Overall Conspiracy*

There was evidence adduced by the government from which the jury could find that the core of this case was

5 Appellants were sentenced as follows:

Count 1:	Drew	Six months imprisonment, followed by two years probation.
	Horvat ...	Six months imprisonment, followed by two years probation.
	Orpheus ..	Three months imprisonment, followed by two years probation.
Counts 7-13:	Drew ...	One year suspended sentence.
	Horvat ...	Imposition of sentence suspended.
	Orpheus ..	Imposition of sentence suspended.
Counts 14-18:	Horvat ...	Imposition of sentence suspended.
	Orpheus ..	Imposition of sentence suspended.
Count 19:	Blitz	One year imprisonment and $5,000 fine.

a large scale conspiracy. It was engineered chiefly by George Van Aken. Its purpose was to drive up the price of the common stock of Elinvest. After gaining control of the limited public market in Elinvest, Van Aken and his co-conspirators manipulated the supply and demand of the stock, paid off brokers to foist Elinvest shares upon their customers, and utilized deceit and threats of force to induce the public to invest in the stock. The object was to net Van Aken and his co-conspirators an enormous windfall on their stock interests in Elinvest at the expense of innocent public investors.

(B) *Take-over of Elinvest Market*

In March 1971, van Aken[6] discovered that Elinvest common stock would make a good vehicle for stock manipulation. Elinvest was a shell corporation with virtually no assets. At that time its common stock, which was held by

6 Before trial, Van Aken pleaded guilty to the conspiracy count (Count 1). He became a key government witness against appellants and Rosan. He was sentenced to a three year term of imprisonment and a $10,000 fine on this count.

At the same time Van Aken was sentenced to a concurrent three year term of imprisonment and an additional $10,000 fine on his guilty plea to one count of another indictment for conspiring to violate the securities laws with respect to the stock of Health Evaluations Systems, Inc. In the Health Evaluations indictment Van Aken also was charged with masterminding a large scale market manipulation similar to the Elinvest manipulation.

In addition to the Elinvest and Health Evaluations indictments, Van Aken was indicted in November 1972 for various securities law violations in connection with the stock of Academic Development Corp., including fraud and bribery of an investment advisor. After Van Aken's guilty pleas to the other two indictments, the Academic Development indictment charges against him were dismissed.

Aside from Van Aken, defendants Gerstenzang, Rosenthal, McLeod and Ross, each of whom had pleaded guilty to the conspiracy count prior to trial, see note 1 *supra*, testified for the government at trial. The government also called a number of customers as witnesses who testified that they had been fraudulently induced to purchase Elinvest stock.

a small number of persons who had acquired it as a stock dividend, was selling for about $4 per share. Since there were only about 40,000 public shares which could be freely traded and they were in the hands of a relatively small number of shareholders, the price could easily be driven up.

Control of the small public market in Elinvest was accomplished by having several of Van Aken's business acquaintances, who had controlled Elinvest, cause that company to purchase the assets of the Leisure Time Marine Corp. (LTMC) in exchange for a distribution of Elinvest stock to LTMC shareholders.[7] Although Van Aken owned no LTMC stock himself, he was a large creditor of that corporation. He arranged for his father-in-law, John Bradley, to purchase 50,000 shares from LTMC for $50,000[8] upon the understanding that Bradley would get the first $50,000 of any profit and Van Aken would get any profit beyond that. In addition, after the plan to acquire control of Elinvest had coalesced, Van Aken loaned one Steven B. Duke $7,500 with which to purchase 55,000 shares of LTMC stock.

The take-over of the Elinvest market was engineered by Van Aken and Steven Hill, a New York securities attorney and corporate counsel to LTMC. On April 26, 1971, the acquisition by Elinvest of LTMC's assets was consummated. Under the terms of the agreement, each LTMC shareholder received 1.4 shares of Elinvest for each LTMC share he had formerly held. Although there were approximately 48 LTMC shareholders at the time of the exchange, Hill and Van Aken arranged for all of the newly issued Elinvest shares which were distributed to LTMC

7 LTMC was a small and financially unsound corporation. Since LTMC stock was restricted and not freely tradable, it could not be used for market manipulation.

8 Bradley actually paid $45,000. The remaining $5,000 of the purchase price was paid by cancelling $5,000 of LTMC's debt to Van Aken's wife.

shareholders to bear restrictive legends, except those issued to Bradley, Duke, Hill and Hill's two law partners.[9]

In May 1971, Bradley received 70,000 freely tradable Elinvest shares in exchange for his LTMC stock and Duke received 77,000 unrestricted shares. All of the other outstanding Elinvest shares were restricted as to tradability, except those issued to Hill and his partners and the 40,000 shares publicly held by original Elinvest shareholders. This left Van Aken and his co-conspirators in effective control of the public market in Elinvest. The stage was set for manipulation of the price of the stock.

(C) *Blitz and the Astron Fund*

In May or early June 1971, Van Aken telephoned Blitz, vice-president and portfolio manager of the Astron Fund.[10] He offered Blitz $25,000 if he would cause the Fund to purchase 25,000 shares of Elinvest from Bradley at $5 per share.[11] Blitz was noncommittal at the time. In a telephone conversation with Van Aken several days later, however, Blitz said he was interested in buying the 25,000 shares for the Fund and asked if the $25,000 offer was still open. Blitz said his brother was having legal difficulties and that he needed the money for legal fees. Van Aken told Blitz he would be paid the $25,000 after the Astron Fund's purchase of the Elinvest stock was completed.

9 After being informed that Van Aken intended to drive up the price of Elinvest stock, Hill requested that his legal fees be paid in LTMC stock which eventually would be converted into freely tradable Elinvest stock.

10 The Astron Fund was a West Coast mutual fund. Blitz worked out of Tacoma, Washington.

11 As portfolio manager of the Fund, Blitz had complete control over the Fund's investments.

On June 9, 1971, Blitz caused the Astron Fund to purchase 25,000 shares of Elinvest for $125,000 from Bradley through R. J. Rosan & Co. This was the New York brokerage firm of defendant Rosan where Van Aken had said the stock would be available.[12] Several days later, Blitz came to New York. He telephoned Van Aken and said that he wanted to pick up the $25,000. Van Aken told Blitz he would have Bradley write a check. Thereafter Blitz and Van Aken met at a New York restaurant. Van Aken handed Blitz a $25,000 check drawn by Bradley to Blitz. Significantly this check was post-dated to June 18, 1971—the date payment was due for the 25,000 shares purchased by the Astron Fund.

In March 1972, when it had become apparent that the SEC was investigating the Elinvest trading, Van Aken telephoned Blitz and told him that he should return the $25,000 bribe to Bradley to protect them both. Blitz said

12 Van Aken testified that, after Blitz had agreed to purchase the initial 25,000 shares, he called Blitz and asked if he would have the Fund purchase an additional 2,000 shares of Elinvest. Blitz agreed to have the Fund make the additional purchase, but it is not clear whether this purchase was ever consummated.

Van Aken also testified that he told Blitz he wanted the Fund to purchase the additional 2,000 shares "to lighten the position that one of the market makers had." Van Aken's market manipulation was effected largely through "market makers". A market maker or trader purchases and sells securities as a principal for his own account or the account of his firm. His profit is the difference between what he "bids" and "asks". By trading the securities, he in effect "makes a market" in the securities. Market making, as such, is legal and is a common practice.

Van Aken and his co-conspirators obviously were concerned with the possibility that the market makers, who had become nervous about the size of their holdings, might start selling their shares at prices which would undermine Van Aken's efforts to drive up the price of Elinvest.

Van Aken's testimony that he asked Blitz to purchase the additional 2,000 shares to lighten the holdings of one of the market makers indicates that Van Aken informed Blitz of the method by which he was attempting to control the market for Elinvest.

he did not have the money at the time. He refused to accept Van Aken's subsequent telephone calls. Van Aken then asked Peter Rosenthal, a broker with Greenman & Co., to get the money back from Blitz. Rosenthal told Blitz that if he returned the money to Bradley he could claim that it was merely a loan.[13] In August 1972, Blitz sent Bradley a check for $26,700 accompanied by a letter which stated that the check was in repayment of a $25,000 loan plus interest.[14]

(D) *"Apartment Group"*

Backing up for a moment, in June 1971 Van Aken arranged for Bradley to pay Rosenthal a $50,000 commission for selling 25,000 shares of Bradley's Elinvest stock for $100,000 to two of Rosenthal's customers.[15] This stock was sold through R. J. Rosan & Co.

Toward the end of the same month, Sonny Santini introduced Orpheus to Van Aken. Orpheus told Van Aken that he was a broker for Ridgeway, McLeod & Associates (RMA), although he was never employed by that firm. He said that he had some customers with "buying power" and was interested in selling Elinvest stock for Van Aken. Van Aken arranged a meeting at his home with Orpheus, Santini and Duke to discuss plans for selling some of Duke's shares. At this meeting Duke gave Orpheus 10,000 of his Elinvest shares to sell.

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13 Rosenthal testified that, when he told Blitz that Van Aken wanted the money returned because of the SEC investigation, Blitz asked him whether Van Aken was bluffing and said he thought the demand was merely a scare tactic by Van Aken. Blitz also told Rosenthal that Van Aken's demand for return of the money was unfair.

14 Van Aken testified that neither he nor Bradley gave Blitz a promissory note when Blitz returned the money to Bradley.

15 On Van Aken's instructions, the money was paid by Bradley to Duke who delivered it to Rosenthal.

On June 28, 1971, Van Aken permitted Santini, Orpheus and one Julie Gladstein to move into Van Aken's apartment, to sell Duke's Elinvest shares since they were unable to find office space elsewhere. At that time Van Aken informed Orpheus that his plan was to raise the price of Elinvest to $7 or $8 per share on the open market and then to bring in some institutions to buy up the stock.[16]

Santini and Orpheus approached William McLeod, president of RMA, and offered him commissions and profits on the sales of Elinvest to their customers if McLeod would allow them to effect the sales through RMA and if RMA would handle the paper work. McLeod testified that Orpheus and Santini told him that when the stock reached $7 or $8 a fund would buy back the stock through RMA.

The so-called "apartment group" got into full boiler room operation on June 29, 1971 when Santini, Orpheus, Gladstein, Bradley, Erwin Gerstenzang, Don Viggiano and Van Aken met at the latter's apartment. Van Aken told the group that he wanted to get the price of the stock above $6 because a mutual fund would purchase a large block on the market when it reached that level. Santini confirmed Van Aken's statement and promised the others 50¢ to 75¢ for each share they sold.

On that same day the co-conspirators began calling customers and market makers on the two phones in Van Aken's apartment. Santini managed the sales operation. Gerstenzang, Gladstein, Viggiano and Orpheus called prospective buyers to solicit purchases of Elinvest stock in Duke's name. Most of the persons called were customers of the various co-conspirators or customers of RMA. Typically, the sales-

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16 Van Aken testified that actually he never intended to have a fund buy the stock, but that he intended to sell Bradley's shares in the market himself after he and his co-conspirators had elevated the price of the stock. Eventually Van Aken began "backdooring" this stock before his co-conspirators realized that he was secretly diluting the market.

men told the prospect that the stock was selling for $3 or $4; that a mutual fund was planning to buy up the stock when it reached $6; and that the prospect could make a profit if he held the stock until he was told to sell it. The co-conspirators gave no indication that they were not employed by RMA. They did not inform prospective purchasers that they were being paid by a private seller for each share they sold, or that they were calling from an apartment rather than from a licensed brokerage firm.[17]

In addition to calling private customers, Orpheus telephoned various market makers to solicit purchases. When these brokers became nervous about having purchased more Elinvest stock than they could sell on the market, Orpheus would buy back the stock in the name of RMA and then inform McLeod of RMA's purchase.

Orpheus also was responsible for keeping track of sales made from the apartment. The salesman informed Orpheus of each sale made. Orpheus telephoned details of the sale to McLeod who then called the customer and confirmed by mail the customer's purchase. When a customer paid RMA for purchases of stock in Duke's name, McLeod drew a check payable to Orpheus and Orpheus paid Duke.

This selling operation continued for several days, from 10 A.M. to 4 P.M. daily. Then Van Aken asked Santini to move the operation out of his apartment. Santini referred Van Aken to Drew who told Van Aken that they needed the apartment and that "if you get wise you can be pushing up daisies". The group continued to use the apartment several days a week through September 1971.

Gerstenzang testified that Drew was at Van Aken's apartment three or four times during July 1971. At one point Drew heard Gerstenzang complain about what he was be-

17 Duke was present in the apartment on several occasions when the stock was being sold.

ing paid. Drew threatened to "work over" Gerstenzang unless he continued making calls to customers. Gerstenzang, miffed, did not come to the apartment for about a week. This invited a call from Drew who said to Gerstenzang that he was "involved with us", "a part of the group", and threatened to teach Gerstenzang a lesson unless he returned to work.

Several victims of the group's salesmanship testified at trial as to how they had been solicited. For example, Dean Willeford, a general partner in a California firm, testified that on June 29, 1971, Viggiano approached him in California with a mutual friend and introduced himself as a salesman for RMA. Viggiano told Willeford that he could "guaranty" the partnership a quick profit of 10% if it invested in Elinvest because a fund intended to buy up the Elinvest stock when it reached $7. Viggiano explained that the fund could not purchase the stock before it reached $7 because its charter prohibited the purchase of stock which sold for less. Several days later, Orpheus, Van Aken and Santini[18] telephoned Willeford and gave him the same pitch. Orpheus introduced himself as a RMA broker and indicated that the investment had RMA's endorsement.[19] Santini also give Blitz' name to Willeford as a reference. Willeford then purchased through RMA 1,000 shares of Elinvest at $5 per share for his personal account.

On July 19, 1971, more than a week after Willeford's first purchase, Orpheus called him again to persuade him to make a further purchase. Orpheus told Willeford that the stock was "ready to move", that it would reach $6 or $7 within the next few days, and that the fund was preparing to make its block purchase. Orpheus also said that the

18 The three spoke together with Willeford on the telephone. Willeford testified that Santini and Orpheus did most of the talking.

19 Van Aken introduced himself as the president of Elinvest.

fund already had purchased 30,000 shares, that it was so happy with its purchase that it intended to buy 30,000 more shares at $7, and that it had given "a tentative order" to buy still another 30,000 shares as high as $11 per share. On this representation Willeford on behalf of his partnership immediately purchased from Orpheus another 1,000 shares at $5¼. To Willeford's dismay, Elinvest had plummetted to 50¢ per share by the time he sold his stock on December 31, 1971.[20]

Another victim of the group's solicitation who testified was Norman Pollisky, a registered representative with the New York brokerage firm of Rimson and Co. and a long time friend of Gladstein. Pollisky met with Gladstein, Santini and Drew at a New York bar in June 1971. At this meeting the three asked Pollisky to purchase 1,000 to 2,000 shares of Elinvest when the price reached $5½ to $6. They promised Pollisky $50 for each hundred shares he purchased. Pollisky said he wanted to see some financial reports on Elinvest before he would make any purchase.[21] He was told that he would be provided with such reports.

About a week later Drew telephoned Pollisky and told him that he wanted him to buy 500 shares of Elinvest that

20 As the price of Elinvest began to drop, Orpheus and McLeod persuaded Willeford to retain his stock. They explained that the "temporary" slip was due to Santini's having dumped a large amount of Elinvest on the market. Orpheus at first convinced Willeford that the temporary dilution of the market would be corrected. As the stock continued to decline, however, Willeford began calling Orpheus and McLeod with greater frequency. Late in August, Orpheus told Willeford to bail out of Elinvest at $2½. He promised Willeford that he would give him 1,000 shares in another bright prospect. Orpheus also agreed to sell Willeford's Elinvest stock for him. Orpheus later told Willeford that unfortunately he could not find a buyer. Willeford never was given the other 1,000 shares.

21 Without any financial date whatever, Gladstein, Santini and Drew had tried to convince Pollisky to purchase Elinvest by showing him a picture of the marina which Elinvest had acquired from LTMC.

day. Pollisky said he had not received any financial reports on Elinvest. Drew renewed his demand that Pollisky make a purchase immediately. Pollisky refused.

The next day Drew called again. He asked whether Pollisky had purchased the 500 shares. Pollisky said he had not. Drew told him that if he did not buy 500 shares of Elinvest he would come up to Pollisky's office and punch him in the mouth. Pollisky asked to speak with Santini. Drew responded, "You are talking to me now. I represent him too." Shortly thereafter Santini apologized for Drew's conduct and told Pollisky that he had calmed down Drew. The next day Pollisky purchased 200 shares of Elinvest for two of his customers at $4½ per share.[22]

During the summer of 1971, 3,000 shares of Duke's Elinvest stock were sold to the public from the apartment for approximately $15,000. In addition, Orpheus, who monitored the market's supply and demand in order to maintain price stability, purchased on behalf of RMA 10,000 shares of Elinvest from various brokers for subsequent sale.

(E) *Baron & Co. Sales*

In addition to the sales made from the apartment, by the Rosan firm and by the individual co-conspirators, a large volume of sales was made through Baron & Co., a New Jersey brokerage firm whose principal partner was Robin G. Baron. Van Aken met Baron and George Linder at Steven Hill's office in May 1971. Van Aken then introduced Linder to Duke. Linder agreed with Duke that he,

22 Pollisky testified that he had suspected that Gladstein, Santini and Drew were manipulating the price of Elinvest. He said that he had turned down their offer initially because he had hoped to profit from the information they had given him by getting his customers to purchase Elinvest stock without becoming personally involved with Gladstein's group.

Linder, would try to find a broker to sell 50,000 shares of Duke's Elinvest stock for a fee of 25% of Duke's profits. Upon Linder's invitation, Baron agreed to sell the stock through Baron & Co. to the firm's customers. Baron promised Van Aken that he would have his customers hold the stock for six months so that Elinvest would remain in short supply on the market and the price would remain stable. In return, Van Aken promised Baron that he intended to "stay in for the long haul".

Between May and August of 1971, Baron & Co. sold its customers about 35,000 shares of Elinvest at $4 per share. The firm purchased the stock from Duke at $3.[23] The firm did not pay for the stock until it had arranged a sale.

A large percentage of the Elinvest shares sold by Baron & Co. were sold through appellant Peter Horvat, one of the firm's brokers. During a substantial part of the period from June through August 1971, Horvat earned almost all of his commissions from sales of Elinvest.[24] His commission was 50¢ for each share he sold although the stock sold for only $4. Horvat knew that Baron & Co. was making $1 per share, or 25% of the sales price.[25]

Four witnesses testified that Horvat had induced them to purchase Elinvest stock with extravagant predictions of rapid profits. Michael Separ purchased $800 worth of

23 Duke received almost $105,000 for shares sold by Baron & Co. between May 14 and August 16, 1971. With a mark-up of $1 per share, Baron & Co. made approximately $35,000 in profits.

24 During one nine week period, Horvat's commissions from Elinvest sales totalled $3,637.50, while his commissions from all other sales amounted to only $63.75.

25 Horvat usually received one-half of the firm's total commission on shares he sold. The firm's total commission legally could not exceed 12.5% for shares sold by the firm as an agent or broker. On shares bought and sold for its own account as a dealer, however, the firm legally could take a larger profit. A 25% profit on sales of securities at no risk was most unusual.

Elinvest at $4 after Horvat and Baron told him that they had inside information about Elinvest and that the stock would soar to $10 or $12 in a short time.[26] Horvat induced other long time friends and customers, including witnesses Thomas Nash, Frank Capsouras and Archibald Denny, to buy upon similar representations of quick profits.[27] Neither Horvat nor Baron disclosed to any of these purchasers the nature or source of their inside information.

Several days after he had purchased his 200 shares Separ called Horvat and said that he wanted to sell his newly purchased Elinvest stock.[28] Horvat told Separ not to sell because that would depress the market for the stock. According to Separ's testimony:

> "He told me that I couldn't—I shouldn't sell it, because I am going to depress the market in it, and they are trying to make a market in it, and, you know, like I say, I'm not in the business; I don't know the familiar terms. These are my words."

26 Separ purchased 200 shares at $4 per share. Horvat told Separ that the stock was worth $5 or $6 per share and that Baron & Co. was selling him the stock at a discount.

Like most of those who were duped by the scheme, Separ was an unsophisticated and inexperienced investor. He testified that he did not understand many of the terms which Horvat used when he pushed the Elinvest stock.

27 Nash, a close friend of Horvat for ten years, purchased at least 100 shares at $4, after Horvat told him the stock would "take off" and reach $6 or $8 in a couple of weeks.

Horvat told his friend Capsouras that the price of Elinvest would double in three months. Capsouras purchased 300 shares at $4.

Denny, after being told by Horvat that Elinvest would reach $6 or $8, purchased 200 shares at $4.

28 Separ's interest in selling Elinvest so suddenly was due to Horvat's earlier representation that the stock purchased by Separ at $4 really was worth $5 or $6 on the market at the time it was purchased and that Separ was being given some sort of discount.

Baron then came on the phone and told Separ not to sell the stock. When Separ asked for his stock certificates Baron told him that delivery would take some time because paper work had to be completed.

Neither Separ, Nash nor Denny ever received their Elinvest certificates. Two other customers[29] also testified that they purchased Elinvest on the extravagant projections of Baron but never received their certificates.

Blitz and Orpheus each testified on his own behalf.[30] Blitz denied that he had accepted the $25,000 to cause him to purchase the Elinvest stock on behalf of the Astron Fund. Rather, he maintained that the money was merely a loan from Van Aken which Blitz needed to help his brother with some legal difficulties. Most of Orpheus' testimony was more helpful to the government's case than to his own. Horvat called George Linder as a witness. Although Linder testified that he had told Baron nothing about the market manipulation and that Baron and Horvat were not participants in the manipulation, Linder's knowledge of dealings between Baron and Van Aken was limited. Moreover, Linder's testimony was undermined by his admissions that he had received a large pay-off to find a broker to sell Duke's Elinvest stock, that he had made a substantial payment to Baron, and that he had conveyed to Baron a message from Van Aken that Bradley should not sell his stock because it would dilute the Elinvest market.

II. Sufficiency of the Evidence

We turn directly to the claims of Orpheus, Drew and Horvat that the evidence was insufficient to support the jury's verdict convicting them on the conspiracy and sub-

29 David Kauffman purchased $8,000 worth of Elinvest after Baron promised "to make [him] a lot of money". Matthew Peterson purchased 100 shares. Both made repeated demands for their certificates but never received them.

30 Orpheus and Blitz were the only defendants who testified at the trial.

stantive counts.[31] Viewing the evidence in the light most favorable to the government, as we must, we hold that each of these claims is without merit.

We shall analyze the evidence separately in support of the conspiracy count, the stock fraud counts and the mail fraud counts and, with respect to each of these groups of counts, as applied to the three appellants who assert claims of insufficiency of the evidence to convict them.

(A) Conspiracy Count

As our summary above shows, there was overwhelming evidence from which the jury could have found a large scale, brazen conspiracy to drive up the price of the virtually worthless Elinvest stock and to reap windfall profits for Van Aken, his fellow shareholders and a band of highly paid salesmen at the expense of innocent purchasers and public investors. While the illegality of the scheme speaks for itself, it is significant to note that the operation included a laundry list of securities law and mail fraud violations, including covert manipulation of the market, failure to disclose that a large group of persons had combined to control the stock's supply and demand, fraudulent promises of quick profits made by salesmen to friends and customers, and concealment from purchasers of the fact that the salesmen were being paid large fees by Van Aken and his co-conspirators to sell the stock. In short, this was a sophisticated boiler room operation.

We proceed to an analysis of the evidence in support of the respective appellants' convictions on the conspiracy count.

31 Blitz does not claim the evidence was insufficient to convict him on the Investment Companies Act count (Count 19), the only one on which he was convicted.

(1) *Orpheus*

At the outset we note that, although Orpheus states in his brief that there is "not one iota of evidence that [Orpheus] . . . had reason to believe other than that this was a normal stock promotion", he concedes in the same brief that Van Aken told him that "he [Van Aken] was trying to bring the price of the stock to about 7 or 8 so that he could 'bring in some institutions who would buy the stock'."

Orpheus testified that he knew that the purpose of the operation was to drive up the price of Elinvest. He admitted that he had participated earlier in a scheme with Santini, whom he characterized as a member of organized crime, to drive up the price of Integrated Automated stock —a scheme in which his function was to monitor the supply and demand of outstanding shares so that the market would not be diluted. Although Orpheus disputed the testimony of various government witnesses that he had "called" customers about Elinvest, he admitted the substance of Willeford's testimony that Orpheus had told Willeford that a mutual fund already had purchased 30,000 shares, that the fund was so happy with its investment that it intended to purchase another 30,000 shares at $7, and that the fund had given a tentative order to purchase more stock as high as $11, all of which was false. Orpheus also admitted that, after a week or two with the apartment group, he believed that brokers were being paid off to help raise the price of Elinvest. Orpheus further admitted that he had committed perjury before the SEC when questioned about Elinvest trading.[32]

Independent evidence, as well as Orpheus' own testimony, established that he and Santini were the ringleaders of the

32 Orpheus also admitted that he knew that neither Gerstenzang nor Gladstein were licensed as brokers; and that the SEC had barred Gerstenzang from selling securities.

operations of the apartment group. Orpheus arranged for Ridgeway, McLeod & Associates to handle the group's sales. He acted as the liaison between RMA and the group. He took payments from the firm in his own name and informed McLeod of each sale the group made. While the jury was free to accept or reject Orpheus' testimony, his claim that, despite his presence in the same room where the others were selling, he was not aware of the fraudulent sales pitches that were being used, strikes us as utterly incredible. This is particularly so in view of the fraudulent representations Orpheus himself had made in selling the stock in an effort to drive up the price. In addition to giving assurances of quick profits, Orpheus falsely held himself out as a RMA broker and failed to disclose to his customers the existence of the large scale manipulation or his relationship to Van Aken. Experienced in market manipulation after his role in the Integrated Automated scheme, Orpheus meticulously monitored the supply and demand for Elinvest, including the repurchase of shares from market makers who became nervous about the size of their Elinvest holdings.

(2) *Drew*

Drew asserts that his participation "was limited to forcibly inducing others to sell securities". He contends that "there is an absolute dearth of evidence" that he intended to pressure the salesmen to sell fraudulently or that he knew about the fraudulent activity of the others.

Drew's claimed lack of knowledge was squarely contradicted by Pollisky's testimony that Drew, together with Santini and Gladstein, offered him a bribe of $50 for every 100 shares of Elinvest he purchased. After Pollisky had said he wanted to see financial reports on Elinvest before making any purchase, Drew, without furnishing such

reports, called Pollisky and ordered him to purchase 500 shares. When Pollisky declined, Drew threatened to punch him in the mouth unless he did so.

Drew also threatened Van Aken by telling him that he would be "pushing up daisies" if he tried to throw Santini and his group out of his apartment. He also threatened to "work over" Gerstenzang unless he kept making calls to customers. Such threats bespeak something more than a desire to keep a legitimate sales operation running smoothly.

Drew made numerous visits to the apartment while the boiler room operation was going on. He accompanied Santini on sales visits to customers. In view of this activity Drew's statement to Gerstenzang that the latter was "involved with us" and "a part of the group" is particularly incriminating.

We hold that Drew's knowing and willful participation in the conspiracy as a salesman and an enforcer was fully established.

(3) *Horvat*

The evidence in support of Horvat's conviction on the conspiracy count is on a different footing from that of Orpheus and Drew. This is so because of the different role of Horvat in the conspiracy and because the evidence implicating Horvat was largely circumstantial.

Horvat claims that the evidence was insufficient to show that he knew about the Van Aken-engineered conspiracy to manipulate the price of Elinvest. He argues that the "projections" which he made to his customers were not fraudulent; but, even if they were, he contends that the evidence failed to establish that he knew that he was promoting a large stock manipulation.

In order to focus upon Horvat's role in the conspiracy, we must bear in mind that Baron & Co. was one of the

principal outlets through which Elinvest shares were sold to the public. Horvat was the firm's salesman through which approximately 7,275 Elinvest shares were sold during a nine week period beginning in May 1971 and from which Horvat earned $3,635.50 in commissions. Horvat participated with Robin Baron, the principal partner of the firm, in channeling 35,000 Elinvest shares which had been in Duke's name into the hands of the firm's innocent customers and away from the public market, thus preventing the market price of the stock from being depressed. Horvat and Baron together performed a critical role necessary to the success of the overall conspiracy.

True, there was no evidence that Horvat ever met with Van Aken or members of the apartment group, or that Horvat learned of the market manipulation other than through either Baron or Linder or both.[33] Rather, there was ample circumstantial evidence from which the jury could have found that Horvat knew or must have known of the overall conspiracy. This is understandable, since Horvat's only link with the other conspirators was through Baron and Linder.

We reject out of hand Horvat's claim that he did no more than give price projections to his customers. He solicited purchasers with *positive* assurances of *quick* profits. Such assurances could not have been based upon good faith business judgment. He knew that others were hard at work driving up the price of Elinvest.[34] Moreover, he denied before the grand jury that he had made any price projections at all. Aside from attempting to conceal his participa-

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33 Baron knew about the entire conspiracy from Van Aken. He had pleaded guilty to one count of securities fraud before trial.

34 It also is significant that Horvat made different projections to different customers. He told Separ that the stock would soon reach $10 or $12, but told others that the price would go up to $6 or $8.

tion in the conspiracy by such false exculpatory statements, this belies his claim on appeal that all he did was give legitimate projections which were well founded on his assessment of Elinvest's future.

We find no merit moreover in Horvat's claim that the evidence, even if it established that he made fraudulent representations, did not support the inference that he knew he was part of a larger conspiracy to manipulate the price of Elinvest. Separ, who purchased Elinvest from Horvat, testified that Horvat tried to discourage him from selling his shares by telling him that he would depress the market if he did.[35] When Separ asked for his stock certificates, Baron and Horvat told him that delivery would be delayed for a while due to the paper work. Separ, as well as other Horvat customers, never received his certificates. Horvat was concerned about keeping his customers in line.[36]

Furthermore, during a substantial part of the summer of 1971 Horvat earned almost all of his commissions from Elinvest. He knew that Baron & Co. was being paid 25% of the price of the stock, even though the sales were risk-free to the firm. This further undermines Horvat's claim that he did not know of the source of the firm's Elinvest

35 Horvat could hardly have believed that he alone could keep up the price of Elinvest. Obviously he knew that others who substantially controlled the Elinvest market also were striving not to dilute the market and thus artificially manipulating the price of the stock.

36 Significantly, Horvat testified before the grand jury that Baron told him to have his customers hold the stock, rather than resell it, so as not to depress the market. He testified that Baron told him that the reason for his concern over depressing the market was that Elinvest planned to make acquisitions with its stock. Regardless of the purpose of the manipulation (and we note that his explanation to the grand jury differed sharply from what Horvat told Separ, see p. 2777 *supra*), clearly Horvat knew of a scheme to manipulate the Elinvest market and that the scheme could not have succeeded without the help of other persons who controlled the majority of the Elinvest shares.

shares or that Baron had become involved in an illegal scheme.[37]

Finally, the certainty with which Horvat assured his customers that the price of Elinvest was about to soar to specified levels also supports an inference that Horvat knew that the stock was artificially being driven up.

We hold that there was ample evidence from which the jury could have found that Horvat knew of the large-scale manipulation, his understanding of Baron's and his own critical roles in the scheme and his willing participation in it.[38]

(B) Substantive Securities and Mail Fraud Counts

Orpheus, Drew and Horvat each was convicted on the substantive counts of securities fraud (Counts 7-13). Orpheus and Horvat each was convicted on the substantive counts of mail fraud (Counts 14-18).

The government concedes that the evidence was insufficient to support the convictions of Orpheus and Drew on Counts 7-12 for securities fraud and that the evidence was insufficient to support the conviction of Orpheus on Counts 14-17 for mail fraud. We therefore reverse their convictions on those counts.[39]

37 In May 1972, Horvat testified before the SEC that he never heard of Van Aken until after he left Baron & Co. in August 1971. In May 1973, however, Horvat testified before the grand jury that he knew that Van Aken as an officer of the company controlled Elinvest.

38 As we said in *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2 Cir.), *cert. denied*, 397 U.S. 1028 (1969), "Pieces of evidence must be viewed not in isolation but in conjunction." See also *United States* v. *Calabro*, 449 F.2d 885, 890 (2 Cir. 1971), *cert. denied*, 410 U.S. 926 (1973).

39 The counts which the government concedes should be reversed were based on sales and mailings by others before Orpheus and Drew joined the conspiracy.

This leaves for our consideration the sufficiency of the evidence to support the convictions of Orpheus for securities fraud on Count 13 and for mail fraud on Count 18; the conviction of Drew for securities fraud on Count 13; and the convictions of Horvat for securities fraud on Counts 7-13 and for mail fraud on Counts 14-18.

For the reasons below, we hold that the evidence was sufficient under the court's charge to support the convictions of each of these appellants on each of the substantive counts before us on the ground that the fraudulent sales and mailings were made either by appellants directly or by others who were aided and abetted by appellants under 18 U.S.C. §2 (1970).[40]

40 The court's aiding and abetting charge, given separately with respect to the securities fraud counts and the mail fraud counts, correctly informed the jury of the requisite elements of that offense, including knowledge and approval by each defendant whose case was under consideration of the fraudulent sales and mailings by others. This charge was in substantially the form repeatedly approved by us. See, e.g., *Wapnick* v. *United States*, 355 F.2d 136, 138 (2 Cir. 1966). Except for one frivolous request (that the court charge that "the defendant must have aided and abetted in some kind of a meaningful way"), there was no objection to the court's aiding and abetting charge. By its verdict, the jury found that the government had sustained its burden of proving beyond a reasonable doubt each essential element of aiding and abetting as to each count on which it convicted on this theory.

Parenthetically, we note that in our view the evidence would have justified a charge under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). See *United States* v. *Sperling*, 506 F.2d 1323, 1340-42 & n. 27 (2 Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In *Pinkerton*, the Supreme Court held that a defendant may be convicted of the substantive offenses committed by his co-conspirators in furtherance of a continuing conspiracy if the defendant in question knew that the conspiracy might encompass such conduct, even though he did not participate in the substantive offenses or have any knowledge of them. The court in the instant case, however, refused the government's request that it charge under *Pinkerton* with respect to the substantive counts—a ruling more favorable to the defendants than the record warranted. Since the case was not submitted to the jury under *Pinkerton* but only under the aiding and abetting statute, we confine our ruling to the correctness of the aiding and abetting charge and the sufficiency of the evidence to support the convictions upon that theory.

(1) *Orpheus and Drew*

The only substantive count of securities fraud on which Orpheus and Drew were convicted which is before us is Count 13. That count involved the fraudulent sale of 200 shares of Elinvest stock by Horvat to Archibald W. Denny, Jr. on July 8, 1971. By this time Orpheus and Drew were deeply involved in the fraudulent scheme. Each participant in the scheme to drive up the price of the stock had a stake in the successful efforts of the others who were involved in creating a demand for the stock, in making sales, and in discouraging customers from selling their shares for fear of depressing the market if they did.

Specifically, the efforts of Orpheus and Drew in stimulating the Elinvest market aided the efforts of the others in driving up the price of the stock. Orpheus and Drew knew that the price of the stock could not be driven up successfully within a short time without an intensive, marketwide effort. From the very nature of the scheme and their knowledge of it as detailed above, both Orpheus and Drew most assuredly knew that Van Aken was making sales on his own and that he was enlisting other brokers to do likewise.[41] Indeed, it was vital to the success of their own efforts to drive the price of the stock up that he do so. Since Orpheus and Drew necessarily knew that others would be involved in the large scale market manipulation, it is of no significance under elemental aider and abettor doctrine that they did not know the identity of Horvat as the principal (with respect to the July 8, 1971 sale) whom they were aiding and abetting. *United States* v. *Bradley*,

41 Both Orpheus and Drew knew that Van Aken had first invited *them* into the scheme. They also knew that Van Aken had sold 25,000 shares to the Astron Fund through Blitz and that Van Aken had enlisted Rosenthal to help sell the stock. Moreover, one of Orpheus' principal functions was to enlist other brokers to push Elinvest and to monitor its supply and demand in the market.

421 F.2d 924, 927 (6 Cir. 1970), and cases there cited. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-19 (1949).

The conviction of Orpheus for mail fraud charged in Count 18 was based on evidence of his direct participation in the sale of Elinvest stock to Lenore Braunfeld. The sale was made from Van Aken's apartment by Gerstenzang. Orpheus personally telephoned McLeod to alert him to contact Braunfeld and to confirm the sale to her. It is the confirmation of that sale which is the subject of Count 18. Orpheus was properly convicted under this count based on his direct participation in the transaction.

(2) *Horvat*

Of the substantive securities fraud counts on which Horvat was convicted (Counts 7-13), three were based on sales made by Horvat himself (Counts 9, 10 and 13). These sales by Horvat involved fraudulent guarantees of quick profits and failure to disclose the existence of a large scale scheme to manipulate the price of Elinvest.

Horvat's convictions on the remaining four securities fraud counts and on the five mail fraud counts were based on his role in aiding and abetting fraudulent sales of Elinvest stock. Count 7 involved a sale by Baron to Matthew Peterson. Count 8 charged fraud in connection with the sale by Van Aken to the Astron Fund by bribing Blitz. Counts 11 and 12 involved sales made chiefly by Peter Rosenthal and executed through Rosan & Co. Count 14 involved a sale from Baron to Kaufman. Count 15 involved the sale by Van Aken to the Astron Fund, and Counts 16 and 17 involved sales made through Rosan & Co. The sale charged in Count 18 is described above. All of these sales were made long after Horvat had become deeply involved in the fraudulent scheme.

Horvat's essential claim is that, since he did not know the other participants, he could not have aided and abetted

their fraudulent conduct. As stated above, this is not the law. See *United States* v. *Bradley, supra; Nye & Nissen* v. *United States, supra.*

The evidence—notably the certainty with which Horvat assured his customers that the price of Elinvest would soar and his attempts to dissuade his customers from reselling their shares—clearly demonstrated Horvat's knowledge of his role in the market manipulation. Horvat could not possibly have thought that he and Baron were manipulating the market alone, for he knew that a supplier was delivering the stock to Baron & Co. and that that firm did not control the Elinvest market.[42] Horvat was no newcomer to the securities business. He knew that the success of this market manipulation, like any scheme to drive up the price of a publicly traded stock, depended upon an intensive, large-scale effort, involving as many brokers and salesmen as could be enlisted. As we pointed out in *United States* v. *Finkelstein*, 526 F.2d 517, 521-22 (2 Cir. 1975), a case involving a similar market manipulation:

> "The consummation of each particular fraudulent transaction . . . was dependent upon the successful exploitation of the illusion of legitimate market activity—an illusion to which each transaction contributed its share."

Under all the circumstances of the instant case, Horvat necessarily knew that there were other salesmen involved in this large scale market manipulation—unless he deliberately closed his eyes to that fact.

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42 Horvat also knew that Baron & Co. was receiving a $1 pay-off, or 25% of the sales price, for each share sold, even though marketing the stock involved no risk to the firm. It is also noteworthy that Horvat's grand jury testimony directly contradicted his claim before the SEC that he had never heard of Van Aken. See note 37 *supra*.

Horvat points out that two of the securities fraud counts on which he was convicted (Counts 11 and 12) involved sales made through Rosan who was acquitted by the jury on all charges. The evidence, however, clearly established that Rosenthal had played the major role in soliciting each of these customers. The jury could have believed Rosan's defense that he knew nothing about the conspiracy and made no fraudulent representations. There is nothing inconsistent between Rosan's acquittal and Horvat's conviction for having aided and abetted Rosenthal's fraudulent sales or sales by Rosan to customers who did not receive full disclosure because Rosan was not told of the scheme.

We hold that the evidence was sufficient to support the convictions of Orpheus, Drew and Horvat on each of the securities fraud and mail fraud counts here under review.

III. Severance

Blitz and Horvat claim that they were entitled to severances of their respective cases under Fed. R. Crim. P. 14.[43]

We summarily reject Horvat's severance claim since we have held that there was sufficient evidence to sustain his conviction on the conspiracy count which charged a single conspiracy. *United States* v. *Sperling*, 506 F.2d 1323, 1342 (2 Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Bynum*, 485 F.2d 490, 497 (2 Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). And of course the relationship between the stock fraud and mail fraud counts on which he also was convicted and the conspiracy count was such as to present no joinder problem.

Blitz' severance claim is on a different footing since he was acquitted by the jury on the stock fraud and mail fraud counts and the court dismissed the conspiracy count as

43 Blitz also urges that his joinder was improper under Fed. R. Crim. P. 8(b). This is but a corollary to his Rule 14 claim.

against him at the close of all of the evidence. He was convicted only on Count 19 of accepting a bribe for the purchase of property in violation of the Investment Companies Act.

Blitz argues that the government had no evidence that he accepted the bribe from Van Aken with knowledge of the overall conspiracy to manipulate the price of Elinvest. Blitz contends that the government joined him with the others in bad faith since it knew that Van Aken had testified at an earlier trial involving a similar scheme that Blitz was unaware of the market manipulations in which Van Aken was involved.

In view of the evidence summarized above, we hold that there was a sufficient basis for the government in good faith to have believed that it could prove that Blitz, who had been paid a $25,000 bribe to cause the fund to purchase Elinvest stock and who knew Van Aken from past dealings, thought that he was the "unloading" part of a larger conspiracy to manipulate the price of Elinvest when he took the bribe.

Moreover, Blitz has failed to show any prejudice from his joinder. Even if the $25,000 payment to him for buying the stock for his mutual fund was a "loan" as he asserts, it nevertheless was a thing of value proscribed by the Investment Companies Act. See p. 2793 *infra*. The factual and legal issues involved in Count 19 were easily and effectively isolated from the other issues in the case. The court, in marshalling the evidence in its charge, carefully distinguished Blitz' case from those of the other defendants. The conspiracy count as against Blitz was not submitted to the jury. And the jury acquitted him on all counts that were submitted except Count 19.

We hold that the court did not abuse its discretion in denying Blitz' motions for severance and for a new trial based on improper joinder. *United States* v. *Miley*, 513

F.2d 1191, 1209 (2 Cir.), *cert. denied*, —— U.S. —— (1975); *United States* v. *Sperling*, *supra*, 506 F.2d at 1342.

IV. Grand Jury Evidence

Blitz and Horvat attack the procedure by which the instant indictment, which superseded an earlier indictment, was returned.

Blitz and Horvat contend that a government attorney improperly took the witness stand and read to the second grand jury testimony from the first grand jury proceedings; and that some of the testimony read to the second grand jury was incompetent because it had been presented to the first grand jury after the expiration of its term. Blitz claims that the government improperly failed to read his own grand jury testimony in an unrelated case to the grand jury that returned the instant indictment; and that the evidence before the second grand jury was insufficient to support the indictment as to him.

The short answer to these claims is that they have been waived, since neither Blitz nor Horvat raised them before trial as required by Fed. R. Crim. P. 12(b)(2).[44]

Moreover, the claims are without merit. Even if some of the testimony read to the second grand jury had been received by the first grand jury after the expiration of its term, see *United States* v. *Fein*, 405 F.2d 1170 (2 Cir. 1974), and therefore was hearsay, ". . . an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). See *United States* v. *James*, 493 F.2d 323, 326 and cases there cited (2 Cir.), *cert. denied*, 419 U.S. 849 (1974).

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44 Indeed, Horvat raised his claims for the first time after trial.

Mindful of our concern that a prosecutor shall not put into issue at trial his credibility or professional integrity, *United States* v. *Spangelet*, 258 F.2d 338, 342-43 (2 Cir. 1958), we hold here that the prosecutor did not place his credibility on the line with the ministerial act of reading prior testimony to the grand jury any more than when counsel reads at trial properly admitted prior testimony, whether in the form of a deposition, grand jury testimony or otherwise.

Finally, we find too frivolous to warrant discussion Blitz' claim regarding the government's failure to read to the instant grand jury that indicted him his prior testimony before an unrelated grand jury, as well as his claim that there was insufficient evidence to support the indictment against him.

V. Charge and Evidentiary Rulings

Blitz, Drew and Orpheus claim error in the court's charge as given, in the court's refusal to charge as requested, and in certain evidentiary rulings by the court.

In its charge on Count 19, the court told the jury that it could convict Blitz if it found that he had accepted any form of compensation in return for causing the Astron Fund to purchase Elinvest stock. Blitz argues that the jury was misled into believing that it could convict Blitz even if it found that Van Aken had merely made a loan to Blitz to induce him to make the purchase.

The court clearly charged the jury that, whatever the form of compensation, it could convict Blitz only if the compensation was in return for Blitz' causing the fund to make the purchase. As a matter of law, it was immaterial whether the bribe was in the form of a loan or some other form of compensation, *United States* v. *Deutsch*, 451 F.2d 98, 114-15 (2 Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972),

provided the jury found under the court's charge each of the requisite elements of a violation of Section 17(e)(1) of the Investment Companies Act.[45]

Orpheus claims that the trial judge should have granted his request to charge that market making, in itself, was a legitimate function. Our careful examination of the charge as a whole, given at the end of a five week trial and immediately following lengthy summations by counsel, leaves us with the firm conviction that the court clearly separated for the jury the fraudulent from the legitimate market activities and correctly defined the proper basis upon which the jury could convict each of the respective defendants. More than this was not required under the circumstances.

Drew claims that the court improperly allowed the jury to consider against him certain grand jury testimony by Orpheus that Drew had received money from Santini for the sale of some Elinvest shares. Since Orpheus testified at trial and was available for cross-examination, and since his trial testimony was inconsistent with his grand jury testimony, we hold that the jury properly was permitted to consider the evidence in question in the case against Drew. *United States* v. *Ellis*, 461 F.2d 962, 969 (2 Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *DeSisto*, 329 F.2d 929, 932-34 (2 Cir.), *cert. denied*, 377 U.S. 979 (1964). See also Rule 801(d)(1) of the Federal Rules of Evidence.

Orpheus also challenges the admission of Willeford's testimony of conversations he had with Orpheus over the telephone for lack of a proper foundation to show that Willeford could identify Orpheus' voice over the telephone.

45 Cf. *United States* v. *Roth*, 333 F.2d 450, 453-54 (2 Cir.), *cert. denied*, 380 U.S. 942 (1965), where the same problem was considered with respect to similar statutory language in Section 302 of the Labor Management Relations Act, 29 U.S.C. §186(a) (1970).

In asserting this claim, Orpheus ignores that portion of his grand jury testimony received in evidence in which he admitted speaking with Willeford over the telephone and Orpheus' admission at trial to having spoken with Willeford on the telephone. This surely provided more than an adequate basis for the jury to accept Willeford's identification of Orpheus as the speaker in the conversations to which Willeford testified. *United States* v. *Zane*, 495 F.2d 683, 697-98 (2 Cir.), *cert. denied*, 419 U.S. 895 (1974).

We have carefully examined appellants' other claims of error and find them to be without merit. We order that the mandate issue forthwith.

To summarize:

> We affirm the convictions of Orpheus on Counts 1, 13 and 18; of Drew on Counts 1 and 13; of Horvat on Counts 1 and 7-18; and of Blitz on Count 19.
>
> We reverse, pursuant to the government's concession, the convictions of Orpheus on Counts 7-12 and 14-17; and of Drew on Counts 7-12.[46]

Affirmed in part; reversed in part.

46 We are mindful that in an appropriate case where concurrent sentences have been imposed and some but not all counts are reversed, we have remanded for reconsideration of the sentences imposed on the counts which are affirmed. *United States* v. *Sperling*, 506 F.2d 1323, 1343 (2 Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In the instant case, however, with respect to the counts which we reverse pursuant to the government's concession, *suspended sentences* were imposed on Drew on Counts 7-12 and *imposition of sentence was suspended* on Orpheus on Counts 7-12 and 14-17. Moreover, the sentences imposed on the affirmed counts were exceedingly light. Under these circumstances, we hold that it is neither necessary nor appropriate to remand for reconsideration of sentence.

MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in Judge Timbers' thoughtful opinion in this complex securities fraud case except for its affirmance of the convictions of certain defendants (Drew, Orpheus and Horvat) as aiders and abettors of the commission of certain frauds by others. Since this seems to me to stretch the aiding and abetting concept too far I would reverse the convictions on these counts.[1]

As Judge Timbers accurately observes, there was ample evidence to support a conviction of all defendants as members of one conspiracy consisting of a combination of several groups, each manipulating Elinvest stock as part of a scheme devised by the central figure in the conspiracy, Van Aken. However, when it comes to the specific substantive crime alleged in each of these counts (see fn. 1), there was no evidence that the alleged aider and abettor knew of the fraudulent transaction, or even of the existence of the other group, much less of the member of that group who acted as the principal in committing the criminal act. For instance there was no evidence that Orpheus, who was in the "Apartment Group," knew of Baron & Co. and Horvat, or of their sales.

I accept the proposition advanced on the basis of *United States* v. *Bradley*, 421 F.2d 924, 927 (6th Cir. 1970), that a person need not have been introduced to a principal to be guilty of aiding and abetting his criminal conduct. But implicit in the concept of aiding, abetting, commanding, counselling, assisting or advising is an understanding by the defendant that he is helping someone else to commit

1 The particular counts I would reverse are the convictions of Drew and Orpheus on Count 13 (securities fraud) for aiding and abetting a sale by Horvat, and the convictions of Horvat on Counts 8, 11 and 12 (securities fraud), and 15 through 18 (mail fraud) for aiding and abetting various sales made by Van Aken, Rosan & Co., or the "Apartment Group."

a crime. At least this seems to me to be assumed in Judge Learned Hand's famous definition of aiding and abetting in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), which has for years been almost verbatim the standard boilerplate charge on the subject. In *Bradley*, for instance, the defendant engaged in conduct obviously intended to assist someone in robbing a bank. And in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), the jury could have inferred that since the defendant had concocted the criminal scheme he aided and abetted the crimes committed by his business subordinates in carrying it out. But it seems to me to place an undue strain on the concept to reason that, once a general conspiracy is shown, a minor or subordinate member who commits some act in furtherance of it thereby becomes an aider and abettor of parallel conduct of which he was unaware on the part of another member whose existence is unknown to him, merely because he should have reasonably foreseen that his conduct might assist others to commit such acts. Although such a foreseeability test might provide a basis for tort liability, see *United States* v. *Greer*, 467 F.2d 1064, 1068-69 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973), the relationship strikes me as too attenuated to support a criminal conviction on the theory of aiding and abetting. Cf. *United States* v. *Jackson*, 526 F.2d 1236, 1238 (5th Cir. 1976). Under this theory a minor figure could be penalized for the acts of others over whom he had no control and with whom he had no real connection, merely because they were members of a broad, loosely-knit conspiracy.

I appreciate that, as Judge Timbers has noted, the trial judge might have instructed the jury pursuant to *Pinkerton* v. *United States*, 328 U.S. 640 (1946), that a member of the conspiracy might be convicted of substantive offenses committed by others in furtherance of the conspiracy. This

naturally leads one to ask whether, since these defendants might have been convicted of substantive offenses under *Pinkerton*, it should matter that they were convicted as aiders and abettors. The answer is that, regardless of whether it may be advisable to reconcile the two doctrines, it is unwise to pervert one merely because of the existence of the other. Since a *Pinkerton* charge was refused and we do not know what result the jury would have reached if one had been given, we cannot uphold the convictions on that basis. This very point was made in *Nye & Nissen* v. *United States, supra,* 336 U.S. at 618-22, where the Court, in upholding the conviction of the defendant as an aider and abettor, made it clear that it could not be upheld on the basis of *Pinkerton* because that theory had not been charged.

Supreme Court, U. S.
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No. 75-1537

In the Supreme Court of the United States

OCTOBER TERM, 1976

ERIC BLITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-38) is reported at 533 F. 2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1976. The petition for a writ of certiorari was filed on April 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was defective because certain evidence favorable to petitioner was not presented to the grand jury.

2. Whether the trial court abused its discretion by denying petitioner's motion for a severance.

3. Whether a loan is "compensation" for the purpose of the Investment Company Act of 1940, 54 Stat. 815, as amended, 15 U.S.C. 80a-17(e)(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of accepting compensation other than his stated salary for the purchase of property for an investment company, in violation of 15 U.S.C. 80a-17(e)(1) and 80a-48.[1] He was sentenced to one year's imprisonment and fined $5,000. The court of appeals affirmed in a comprehensive opinion.

In the early spring of 1971, George Van Aken took control of Elinvest, Inc., a shell corporation possessing virtually no assets, and began to manipulate the supply of and demand for Elinvest stock. He attempted to inflate the price of Elinvest shares, after which he and his associates planned to sell their shares for handsome profits (Pet. App. A-6 to A-8).

Van Aken enlisted the aid of petitioner, the vice-president and portfolio manager of the Astron Fund, a mutual fund. Van Aken offered petitioner $25,000 if petitioner would arrange for Astron to purchase (for $5 per share) 25,000 shares of Elinvest stock (Pet. App. A-8).[2]

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[1]Petitioner was indicted on several counts of a 25-count indictment with fourteen other people. Eight of these (including George Van Aken, the engineer of the conspiracy and the government's principal witness) pleaded guilty prior to trial to various counts. Two defendants were severed, and petitioner was tried with four others. He was found not guilty of substantive offenses charging mail fraud and securities fraud. At the close of all of the evidence, the court dismissed a conspiracy charge against petitioner and certain securities fraud offenses against all defendants (Pet. App. A-2 to A-4 and n. 4).

[2]Petitioner had complete control over Astron's investments (Pet. App. A-8 n. 11).

Petitioner agreed. Van Aken said that the money would be paid as soon as the purchase was completed (*ibid.*).

On June 9, 1971, petitioner caused Astron Fund to purchase the 25,000 shares from Van Aken's father-in-law. Van Aken apparently reaped $75,000 from this purchase.[3] Van Aken gave petitioner a check for $25,000, post-dated to the day that payment was due on Astron's Elinvest purchase (Pet. App. A-9).[4]

Nine months later, Van Aken called petitioner and told him that the Securities and Exchange Commission was investigating trading in Elinvest. He suggested that petitioner could protect both of them by returning the $25,000, which then could be proclaimed a "loan" (Pet. App. A-9 to A-10). Petitioner replied that he did not have the money and later refused to accept Van Aken's calls (Pet. App. A-10). Petitioner told one of Van Aken's associates that Van Aken's demand for the return of the money was "unfair" (Pet. App. A-10 n. 13). In August 1972, however, petitioner repaid the money with interest, accompanying the repayment with a letter stating that the money had been a loan (Pet. App. A-10).

ARGUMENT

1. Petitioner contends that the indictment was defective because the grand jury was not informed of certain evidence favorable to him, including the facts that

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[3]Van Aken originally had arranged for Bradley, his father-in-law, to supply $50,000 of the money necessary to gain control of Elinvest. The two had agreed that Bradley would receive the first $50,000 of return, and that Van Aken would receive any surplus (Pet. App. A-7).

[4]Van Aken testified that he asked petitioner to have Astron purchase an additional 2,000 shares of Elinvest "to lighten the position that one of the market makers had" (Pet. App. A-9 n. 12). This indicates that petitioner was aware of the method by which Van Aken was driving up the price of Elinvest shares (*ibid.*).

he had testified before another grand jury and that he had been acquitted on an unrelated but similar stock manipulation charge. This contention fails because it was not made before trial, as Fed. R. Crim. P. 12(b)(2) requires.

Moreover, it is settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence" (*United States* v. *Calandra*, 414 U.S. 338, 345). See also *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, slip op. 6-7 (plurality opinion). The arguments made by petitioner do not detract from the facial validity of the indictment.

2. Petitioner contends that the trial court should have granted his motion for a severance. He argues that the government joined him in the conspiracy count in bad faith, attempting to link him to the unsavory activities of Van Aken and his henchmen (Pet. 35-36). The contention is inaccurate.

The conspiracy alleged involved stock manipulation, mail fraud and securities fraud.[5] The fact that petitioner had accepted a $25,000 bribe from the major conspirator was sufficient to establish the prosecution's good faith belief that it could link petitioner with the rest of the joint venture. The court of appeals therefore properly held, after reviewing the evidence, that there was (Pet. App. A-31):

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[5]Petitioner's case could have been properly joined in this indictment even if no conspiracy had been alleged. The violation of the Investment Company Act was one of a number of charges against petitioner arising out of the "same series of acts or transactions constituting an offense or offenses" comprising the Elinvest manipulations. Fed. R. Crim. P. 8(b). See *United States* v. *Granello*, 365 F. 2d 990, 993-995 (C.A. 2), certiorari denied, 386 U.S. 1019.

> a sufficient basis for the government in good faitl to have believed that it could prove that [petitioner] who had been paid a $25,000 bribe to cause [Astron] to purchase Elinvest stock and who knew Van Aker from past dealings, thought that he was the "unload ing" part of a larger conspiracy to manipulate th price of Elinvest when he took the bribe.

In any event, petitioner has failed to demonstrate that he suffered any cognizable prejudice from the joinder. He does not challenge the sufficiency of the evidence on which he was convicted. The court of appeals noted that the district court "carefully distinguished [petitioner's] case from those of the other defendants" (Pet. App. A-31). The jury demonstrated its ability to distinguish among offenses and offenders by acquitting petitioner on all but a single charge. Accordingly, petitioner has failed to show that the court abused its discretion by denying his motion for severance. *Schaffer* v. *United States*, 362 U.S. 511.

3. Petitioner argues (Pet. 50-61) that the trial court incorrectly instructed the jury that it could find him guilty even if the $25,000 payment from Van Aken was a bona fide loan. He contends that a "loan" cannot be "compensation" within the meaning of 15 U.S.C. 80a-17(e)(1). The court of appeals properly rejected the argument (Pet. App. A-33 to A-34). No other court of appeals has passed upon the issue, and consequently there is no reason for this Court to consider it.

The payment to petitioner was "compensation" to petitioner because it was a thing of value given in exchange for petitioner's assistance to Van Aken. The Investment Company Act of 1940 is designed to ensure that individuals in a position to manage other people's money have undivided loyalty. The independent judgment of an investment company advisor may be as subverted

as readily by a timely "loan" of this sort as by an outright bribe.[6] See also 15 U.S.C. 80a-1(b)(1) and (2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1976.

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[6]Petitioner's suggestion (Pet. 58) that the Investment Company Act is unconstitutionally vague is insubstantial. See generally *United States* v. *Powell*, 423 U.S. 87.